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88-6840

No.

ORIGINAL

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1988

Supreme Court, U.S.
FILED
MAR 20 1989
JOSEPH F. SPANIOL, JR.
CLERK

LEONARD MARVIN LAWS,

Petitioner,

vs.

BILL ARMONTROUT, Warden, Missouri State Prison

and

THE ATTORNEY GENERAL OF THE STATE OF MISSOURI

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Appearing on the Petition:

James V. O'Brien
Cordell P. Schulten

Counsel for Petitioner

15388

QUESTION PRESENTED

WHETHER PETITIONER'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED DURING THE PENALTY PHASE OF PETITIONER'S CAPITAL MURDER TRIAL WHEN APPOINTED TRIAL COUNSEL FAILED TO INTERVIEW AVAILABLE WITNESSES IN MITIGATION OF THE DEATH PENALTY OR CONDUCT ANY OTHER INVESTIGATION OF PETITIONER'S BACKGROUND AND FAILED TO INTRODUCE ANY MITIGATING EVIDENCE WHATSOEVER, EVEN THOUGH AMPLE EVIDENCE YIELDING A SUBSTANTIAL LIKELIHOOD OF A DIFFERENT OUTCOME WAS READILY AVAILABLE, IN LIGHT OF THE HEIGHTENED NEED FOR RELIABLE PROCEEDINGS IN CAPITAL CASES UNDER THE SIXTH AMENDMENT MANDATE FOR EFFECTIVE ASSISTANCE OF COUNSEL AND THE FOURTEENTH AMENDMENT REQUIREMENT OF DUE PROCESS.

LIST OF ALL PARTIES TO THE PROCEEDING

The Petitioner, Leonard Marvin Laws, appears through Messrs. Barry A. Short (of record), James V. O'Brien and Cordell P. Schulten (on the petition), 611 Olive Street, Suite 1400, St. Louis, Missouri 63101. The Respondents, Bill Armontrout, Warden of the Missouri State Prison, and the Attorney General of the State of Missouri, appear by the Honorable William L. Webster, Attorney General of Missouri and Stephen D. Hawke, Assistant Attorney General, P. O. Box 899, Jefferson City, Missouri 65102.

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PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

The petitioner Leonard Marvin Laws respectfully prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Eighth Circuit, en banc, entered on December 20, 1988. Alternatively, petitioner prays that the Court summarily reverse the decision of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Missouri, Eastern Division (Hungate, J.) granting petitioner a writ of habeas corpus has not been reported. A copy of this opinion, however, appears in the Appendix at A-88. The opinion and judgment of the three-judge panel of the United States Court of Appeals for the Eighth Circuit reversing the judgment of the District Court and reinstating petitioner's death sentences has been reported at 834 F.2d 1401 (8th Cir. 1987) (McMillian, J., dissenting). A copy of the panel's slip opinion also appears in the Appendix at A-44. The order of the Court of Appeals granting rehearing en banc and vacating the opinion and judgment of the panel is reported at 845 F.2d 782 (8th Cir. 1988). The opinion and judgment of the United States Court of Appeals for the Eighth Circuit, en banc, reversing the judgment of the District Court and reinstating petitioner's death sentences, has been reported at 863 F.2d 1377 (8th Cir. 1988) (McMillian, J., dissenting, with whom Lay, C.J., and Heaney and Arnold, JJ. joined). A copy of the slip opinion of the en banc court appears in the Appendix at A-1.

JURISDICTIONAL STATEMENT

The Petitioner, Leonard Laws, filed his Petition For Writ of Habeas Corpus with the United States District Court, for the Eastern District of Missouri, Eastern Division, on October 29, 1986. The Honorable William L. Hungate, Judge, United States District Court for the Eastern District of Missouri, Eastern Division, granted the Writ of Habeas Corpus on December 15, 1986. The District Court's order vacated petitioner's death sentences but permitted the State of Missouri to retry petitioner's penalty phase in order to obtain the death penalty again upon thirty days notice. The State of Missouri timely filed its notice of intent to retry petitioner's penalty phase.

On January 5, 1987, respondents Bill Armontrout and the Missouri Attorney General filed their notice of appeal from the District Court's order to the United States Court of Appeals for the Eighth Circuit. A three-judge panel of the Eighth Circuit reversed the District Court judgment and reinstated Petitioner's death sentences on December 9, 1987.

On December 23, 1987, petitioner timely filed a motion for rehearing en banc. On April 28, 1988, the United States Court of Appeals for the Eighth Circuit entered an order granting rehearing en banc and vacating the judgment and opinion of the Eighth Circuit panel. On December 20, 1988, the en banc United States Court of Appeals for the Eighth Circuit, in a six-to-four split decision (McMillian, J. dissented and filed a separate opinion in which Lay, Chief Judge and Heaney and Arnold, JJ. joined), reversed the judgment of the District Court and reinstated Petitioner's death sentences.

Petitioner files this Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit within ninety (90) days after the entry of final judgment in the United States Court of Appeals for the Eighth Circuit, and invokes this Court's jurisdiction under 28 U.S.C. §1254 (1) (1986).

CONSTITUTIONAL AND STATUTORY PROVISIONS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S.Const. amend. VI.

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, or deny any person within its jurisdiction the equal protection of the laws.

U.S.Const. amend. XIV, §1, clause 2

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in an proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit--

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

28 U.S.C. §2254(d) (1966)

STATEMENT OF THE CASE

A. Proceedings Below

On October 29, 1986, petitioner Leonard Marvin Laws filed his pro se petition for writ of habeas corpus pursuant to 28 U.S.C. §2254 in the United States District Court for the Eastern District of Missouri, Eastern Division. (See Supplemental Appendix, No. 1).[1] After appointment of present counsel, petitioner filed an amended petition with exhibits on November 14, 1986. (See Supp.App.No. 2). On December 4, 1986, respondents filed their response to the district court's order to show cause why the writ of habeas corpus should not be issued. On December 9, 1986, petitioner filed his reply to this response. On December 15, 1986, after oral argument, the district court entered its order granting a writ of habeas corpus by vacating petitioner's death sentences and allowing the state to proceed again to obtain the death penalty upon thirty days notice to the state court. The underlying conviction for capital murder, carrying at least a sentence of life imprisonment, was left intact. Respondent's motion for reconsideration was denied on December 24, 1986. (A copy of the District Court's Order denying Respondents' motion for reconsideration appears in the Appendix at A-116). Respondents then filed their notice of appeal on January 5, 1987.

On December 9, 1987, a three-judge panel of the Eighth Circuit issued its opinion. (Appendix at A-44). Judge Magill wrote an opinion, in which Circuit Judge Fagg joined, reversing the district court's order and reinstating the death sentence. Circuit Judge McMillian issued a strong dissent, finding the conduct of trial counsel to be "unreasonable and contrary to professional norms." 834 F.2d at 1424 (8th Cir. 1987). (Appendix at A-87).

On April 28, 1988, the Eighth Circuit granted petitioner's Petition for Rehearing En Banc. 845 F.2d 782 (8th Cir. 1988). The full panel issued its split decision on December 20, 1988, with six judges voting to reverse the district court and four judges

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[1] Citations to the Supplemental Appendix containing petitioner's original petition for writ of habeas corpus and his amended petition for writ of habeas corpus with exhibits, filed separately with this petition, will be made as follows: "Supp.App. No. _ or Ex. _ p. _").

voting to affirm. 863 F.2d 1377 (8th Cir. 1988). (Appendix at A-1). Thus, of the total number of federal judges who have considered this matter, five have voted to grant the writ of habeas corpus and set aside the death penalty, and six have voted to deny the writ.

B. Statement of Relevant Facts

In 1982, petitioner was convicted by a jury in St. Louis County Circuit Court of two counts of capital murder on the basis of accomplice liability. (Supp.App. Exhibit A, trial transcript, pp. 784-86). The undisputed evidence was that petitioner had provided the lookout while his companions George and Norman Gilmore actually committed the murders. The day following the return of the verdicts, the court reconvened for the penalty phase of the trial. Petitioner's trial counsel in the capital murder trial at issue (hereinafter referred to as "trial counsel"), however, presented to the jury no evidence whatsoever in mitigation. Instead, trial counsel merely argued in closing that petitioner should not be sentenced to death because Norman Gilmore, one of the murderers, had received only a fifteen-year sentence in exchange for his testimony. (Supp.App. Ex. A, pp. 804-812). In testimony at the state post conviction relief hearing, trial counsel stated his belief that he did not think petitioner would receive the death penalty because petitioner was not "the shooter." (Supp.App. Ex. K at p. 81, lines 1-12).

Petitioner's trial counsel did not introduce any mitigating evidence at the penalty stage because he had simply failed to investigate petitioner's background. The simple fact is that if petitioner's trial counsel had made even the most cursory investigation, he would have uncovered a veritable gold mine of evidence in mitigation to present to the jury that probably would have convinced them to spare his life. First, petitioner was a decorated veteran of the Vietnam conflict. He served in the Army from June 26, 1968 to June 5, 1970 and received an honorable discharge. Petitioner received the National Defense Service Medal, the Vietnam Service Medal, the Vietnam Campaign Medal and the Good Conduct Medal. (Supp.App. Ex. C.). Petitioner was also wounded in an ambush of a convoy in which he was a driver. (Supp.App. Ex. B, ¶). Thus, petitioner had a record of military service which could have been highlighted and was not.

Second, trial counsel failed to investigate and discover this information from petitioner's relatives who resided in the Bonne Terre, Missouri area. Had trial counsel interviewed the relatives, he would have learned that petitioner was a normal young man prior to his entry into the Army at age 17. As his relatives stated in affidavits before the district court, petitioner was a church-going, helpful young man who frequently babysat the children of his two sisters, Bernice Knight and Norma Jean Polite. (Supp.App. Exs. D and E). Petitioner's service in Vietnam, however, changed him. When he returned he had undergone a drastic personality change. He was alone, nervous and withdrawn (Supp.App. Ex. F). He changed from a young man who had never had any trouble with the law to one who was constantly in trouble and in prison.

The record before the district court demonstrated that trial counsel knew next to nothing about Laws' background. The record of trial counsel's efforts in this regard reveal his total failure to investigate any possible avenues to evidence in mitigation. Trial counsel never interviewed petitioner's relatives. Trial counsel's only explanation for his failure to interview the relatives is his reliance upon the statements of some woman, whom he only thought to be petitioner's stepmother, made during a brief telephone conversation that none of the other relatives were willing to testify at petitioner's trial (Supp.App. Ex. K, pp. 77, 78). Trial counsel made no other attempt to contact family, even though he had been told by petitioner to contact petitioner's father. Further, there is no evidence that any of the other relatives were unwilling to be interviewed or cooperate. In fact, petitioner's relatives were willing to and did cooperate with appointed habeas corpus counsel and provided affidavits in support of petitioner's case. Trial counsel's failure to conduct any reasonable investigation of petitioner's family or military background meant that this crucial evidence in mitigation was not only never brought before the jury, but trial counsel never even had the opportunity to consider and reject it.

Third, trial counsel failed to investigate and discover the records of petitioner's past psychiatric treatment. Petitioner had undergone psychiatric examinations in the Mississippi State Hospital in 1974 and 1975 while serving time in the Mississippi Penitentiary on an aggravated assault charge (Supp.App. Ex. B, ¶6 and Ex. J). The

evaluations conducted at the Mississippi State Hospital demonstrate additional evidence of petitioner's personality change after returning from Vietnam. Instead of investigating these records, trial counsel relied solely on a psychiatric examination of petitioner conducted at the Fulton State Hospital. Trial counsel, however, later admitted that he did not know or fully understand the actual scope of the conclusions of the Fulton exam, and did not speak to any psychologist or psychiatrist about their significance (Supp.App. Ex. K, p. 84).

Trial counsel's failure to introduce any evidence whatsoever in the death penalty phase of petitioner's trial is especially egregious in light of the fact that in the prior capital murder case, the Elliott capital murder case, petitioner's same trial counsel had presented testimony from a priest and statistician that the death penalty was inappropriate. There, petitioner received a life sentence. Trial counsel did not introduce such testimony in the present case even though at the time of the instant trial, petitioner had two prior capital murder convictions, along with two armed robberies and an aggravated assault, all of which were put before the jury. (Supp.App. Ex. B, ¶2). Trial counsel thought there was no chance that petitioner would be sentenced to death because petitioner did not actually kill the victims in this case - he was outside the house acting as a lookout when the victims were killed inside the house (Supp.App. Ex. K, p. 81). Thus, when the death penalty phase began on July 23, 1982, a day after the verdict was returned, trial counsel was utterly and totally unprepared to introduce any evidence in mitigation on petitioner's behalf. The jury sentenced petitioner to death without knowing anything at all about his background or family or the circumstances that had led him to that bleak moment.

In the proceedings before the district court, petitioner filed affidavits of family members, military records, and psychiatric examinations demonstrating the evidence in mitigation that trial counsel could have considered putting into evidence had he conducted a reasonable investigation of petitioner's background. The district court issued its order on December 15, 1986. The order contained a thorough recounting of: (1) the procedural history of the case, (2) the testimony of petitioner and trial counsel at the state post-conviction relief hearing, and (3) the exhibits attached to the petition.

After citing the standards set forth in Strickland v. Washington, 466 U.S. 668 (1984), the district court found that trial counsels' conduct did not meet the standard for effective assistance of counsel under the Sixth Amendment.

The judge found that trial counsel's decision not to put any evidence in mitigation was "not based on a reasonably thorough investigation into petitioner's character or background or into other information potentially relevant to mitigating circumstances. The record does not reflect counsel's investigation of petitioner's military or psychiatric background for purposes of the punishment phase of the trial." (Appendix at A-110).

As to trial counsel's efforts to contact relatives, the district court found there had not been "a responsible effort to glean available relatives' own knowledge of and relationship to petitioner," citing the Eighth Circuit's own ruling that " 'when a man's liberty is at stake counsel owes a greater duty than to simply accept someone's hearsay statement that the witness would rather not testify.' Eldridge v. Atkins, 665 F.2d 228, 235 (8th Cir. 1981), cert. denied, 456 U.S. 910 (1982)." (Appendix at A-110, 111).

REASONS FOR GRANTING THE WRIT

I

THE EIGHTH CIRCUIT EN BANC HAS MISCONSTRUED AND ERRONEOUSLY APPLIED THIS COURT'S PRECEDENT IN HOLDING THAT PETITIONER WAS PROVIDED EFFECTIVE ASSISTANCE OF COUNSEL WHEN PETITIONER'S APPOINTED TRIAL COUNSEL FAILED TO INTERVIEW AVAILABLE WITNESSES IN MITIGATION OF THE DEATH PENALTY AND FAILED TO INTRODUCE ANY MITIGATING EVIDENCE WHATSOEVER ON PETITIONER'S BEHALF DURING THE PENALTY PHASE OF HIS TRIAL, EVEN THOUGH AMPLE EVIDENCE WAS READILY AVAILABLE.

A. The Eighth Circuit misconstrued the standard for adequate investigation set forth by this Court in Burger v. Kemp, 483 U.S. 776 (1987).

Although constructing its analysis within the framework of Strickland v. Washington, 466 U.S. 688 (1984), the Eighth Circuit in the present case has reached a decision which is directly in conflict with this Court's ruling in Burger v. Kemp, 483 U.S. 776, 97 L.Ed.2d 638 (1987). The Eighth Circuit reached this decision by misconstruing and erroneously applying the proper constitutional standards for determining the adequacy of counsel's investigation of mitigating facts available for presentation at the penalty phase of petitioner's capital murder trial. In its decision, the Eighth Circuit has

reduced the standards for adequate investigation virtually to nothing, far below those standards set by this Court in Burger. This misapplication will have far reaching effects in the districts which comprise the Eighth Circuit, and throughout the nation, especially in Missouri and Arkansas, as district courts strive to reconcile the Laws decision with Burger. The divergence between the two cases invites the very kind of random and non-uniform application of the death penalty that this Court has endeavored since Furman v. Georgia, 408 U.S. 238 (1972) to eliminate.

In Burger v. Kemp, this Court found that there existed the constitutionally required representation when all potential witnesses had been interviewed and when counsel thereby had all the information necessary to form a reasonable basis for a decision not to "mount an all-out investigation into petitioner's background in search of mitigating circumstances" and present that explanation in mitigation of the death penalty. Burger's trial counsel had at least six conferences with Burger's mother, totally in excess of 3 1/2 hours in duration, in addition to interviewing both an attorney who had befriended the defendant and a psychologist. 97 L.Ed.2d at 655, n.8.

In the very portion of the Burger opinion quoted by the Eighth Circuit in the present case, this Court stated:

> It appears that he did **interview all** potential witnesses who had been called to his attention and that there was a reasonable basis for his strategic decision that an explanation of petitioner's history would not have minimized the risk of the death penalty. Having made this judgment, he reasonably determined that he need not undertake further investigation to locate witnesses who could make statements about [the petitioner's] past.

Burger, at 97 L.Ed.2d at 657. (emphasis added).

The record before the Eighth Circuit in the present case clearly revealed that trial counsel's efforts did not come close to the Burger v. Kemp standard. Petitioner's trial counsel did not interview any of petitioner's relatives brought to his attention. Moreover, trial counsel did not even make any contact at all of the known relatives. Thus, the Eighth Circuit's finding of adequate investigation in this case is strikingly at odds with the facts of Burger v. Kemp. Indeed, it was these blatant deficiencies in trial counsel's investigation which led Judge McMillian, in dissent, to conclude that it was "clear that [petitioner] received ineffective assistance of counsel and was prejudiced thereby." Laws v. Armontrout, 863 F.2d at 1395. (Appendix A-38).

Trial counsel's abject failure to investigate, discover or produce any evidence whatsoever during the death penalty phase of petitioner's murder trial made for a shocking breakdown in the machinery whereby the state takes a man's life. The jury was totally deprived of important and relevant information about petitioner's background and character and prior experience, including his mental instability. They condemned to die a man without hearing any kind of information about his background other than the prior convictions introduced by the state. The sixth and fourteenth Amendments mandate a new trial on petitioner's death penalty phase, as set forth in Missouri Revised Statutes §565.006.3 (1986). ("[I]f the trial court is reversed on appeal because of error only in the pre-sentence hearing, the new trial which may be ordered shall apply only to the issue of punishment.")

The Sixth Amendment requires and protects an adversarial trial process wherein counsel acts in the role of advocate. United States v. Cronic, 466 U.S. 648, 653 (1984). Counsel must act as the accused's spokesperson to put strongly forth the defendant's case, and expose the weaknesses in the state's case. United States v. Ash, 413 U.S. 300, 307-08 (1973); Gardner v. Florida, 430 U.S. 349, 360 (1977). If the process loses its character as a confrontation between adversaries, the Sixth Amendment guarantees have been violated. United States v. Cronic, 466 U.S. at 654.

The emphasis on the reliable functioning of the adversarial process is even more crucial in the context of capital sentencing hearings. "In capital proceedings generally, this Court has demanded that factfinding procedures aspire to a heightened standard of reliability." Ford v. Wainwright, 477 U.S. 399, 106 S.Ct. 2595, 2603 (1986). The qualitative difference in the need for reliability in capital sentencing reflects the difference of a death penalty from a sentence of imprisonment in terms of finality. Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

To meet the goal of reliability in this most important context, this Court has mandated that the fact-finder who decides the sentence must "have before it all possible relevant information about the individual defendant whose fate it must determine." Jurek v. Texas, 428 U.S. 262, 276 (1976). Evidence of a defendant's background and character are a "constitutionality indispensable part of the process of inflicting the

penalty of death." Woodson v. North Carolina, 428 U.S. at 304, 96 S.Ct. at 2991. The departure from automatic death penalty schemes embodies the modern belief that capital sentencing juries must consider and respond to mitigating factors. Williams v. New York, 337 U.S. 241, 247 (1949). The heightened need for reliability in capital sentencing determinations requires that the jury must take into account "as a mitigating factor, any aspect of a defendant's character or record . . ." Lockett v. Ohio, 438 U.S. 586, 604 (1978).

In the instant case, trial counsel introduced no evidence, either during the guilt or penalty phase, regarding petitioner's character or background. Trial counsel claimed to have spoken late one night with a female relative on the telephone who said she did not want to testify on petitioner's behalf and who claimed that none of the rest of petitioner's family wished to either. (Supp.App. Ex. K at 76). Trial counsel could not clearly recall whether he spoke with any of petitioner's brothers or his father, but indicated he decided before trial that he would not put on any mitigating evidence. (Supp.App. Ex. K at p. 86). The statement from petitioner's stepmother indicates that at no time did trial counsel contact her. (Supp.App. Ex. H). Further, the statements of other family members show that trial counsel never spoke to or met with any of them, with the possible exception of a three minute conversation with Larry Laws. (Supp.App. Exs. D, E, F and G).

Yet, this was simply not a case where trial counsel made a strategic decision not to pursue further inquiry. Under Burger, he did not even put forth enough effort to decide whether "to mount an all-out investigation." 97 L.Ed.2d at 657. Petitioner's statement showed what really happened. Trial counsel simply did not bother to prepare or develop any evidence in mitigation since he did not think petitioner would receive a death sentence, stating there was "no way." (Supp.App. Ex. B, ¶3). Trial counsel's failure to prepare for this possibility is inexcusable. By the time of trial, petitioner had two prior capital murder convictions, two armed robbery convictions and an aggravated assault. Trial counsel himself had represented petitioner in the prior capital murder case and had put on evidence in mitigation. Further, during the petitioner's earlier capital murder trial, he did not have the prior capital murder convictions. It is inconceivable that, with

a man's life at stake, and with those prior capital murder convictions coming into evidence, trial counsel did nothing.

Thus, not only did trial counsel do nothing to familiarize himself with petitioner's family circumstances, he did nothing to discover what kind of Vietnam service record petitioner had. He did not learn of the decorations held by petitioner, all of which could have been introduced. And, in conjunction with the failure to interview the family members, he failed to learn of the effect of the war upon petitioner's behavior patterns. In light of the widely recognized post-Vietnam adjustment problems experienced by veterans, and the legislation and legislative history dealing with the problems (see Supp. App., Ex. J), these facts constituted a cache of potentially mitigating circumstances. Yet, trial counsel was never in a position to make a strategic decision to reject or pursue this line of investigation for lack of reasonable preliminary efforts.

Nor did trial counsel familiarize himself with the portions of petitioner's psychological evaluation from Fulton State Hospital which could be used in mitigation, believing the report relevant only if petitioner suffered from a mental disease or defect which excluded liability. Actually the report contained relevant information about petitioner's past treatment, including some intensive observation and treatment at the Whitfield State Hospital in Whitfield, Mississippi. Trial counsel did not even attempt to procure a copy of petitioner's medical records from the Mississippi prison authorities. Petitioner's present counsel obtained a transcript of those records.

Under prevailing norms of reasonable conduct, therefore, trial counsel's action in failing to interview members of petitioner's family and to investigate petitioner's mental history and military service not only clearly falls outside the range of reasonable professional behavior, it is irresponsibility that is per se negligent. Trial counsel himself acknowledged the importance of having family members appear in capital sentencing proceedings. (Supp. App. Ex. K at 77). Yet, he said relied upon the word of a person who lacked any blood relationship to petitioner rather than contacting petitioner's father, sisters or brothers to determine whether they would testify or utilizing every voluntary effort to persuade them to do so. Moreover, the person he says he contacted, petitioner's stepmother, denies that trial counsel ever called her. She stated unequivocally in her

statement that Mr. O'Brien (working at the direction of petitioner's present court appointed lawyer Barry A. Short) was the first attorney ever to talk to her about petitioner Leonard Laws. (Supp.App. Ex. H). Petitioner's court-appointed habeas counsel in fact had little difficulty in finding and speaking with petitioner's entire family. In addition, court-appointed habeas counsel was able, without difficulty, to obtain petitioner's military records in Overland, Missouri, at the U.S. Army records center, and to obtain the records from Whitfield State Hospital and Fulton State Hospital.

The omissions of petitioner's trial counsel are all the more alarming in view of counsel's previous experience with capital sentencing proceedings and this petitioner. Trial counsel had previously represented petitioner in a capital murder trial based on another killing in the George Gilmore plan of robbery-murders. In that case, unlike this one, petitioner was actually involved in the killing. There, trial counsel during the death penalty hearing put on evidence of petitioner's character and testimony of other witnesses against the infliction of the death penalty and, despite petitioner's involvement in the killing, the jury recommended a life sentence.

Inexcusably, trial counsel put on no evidence in the death penalty phase of the double murder prosecution forming the basis of the present sentences. Trial counsel sought to justify this omission by claiming that one or two of the jurors in petitioner's prior murder case had told him they relied in rejecting the death penalty on the "deal" whereby Norman Gilmore had provided the testimony necessary for conviction in exchange for a fifteen year sentence, and had discounted testimony from a clergyman and a statistician put on by trial counsel in opposition to the death penalty. (Supp.App. Ex. K at 79). Accepting trial counsel's claims as true, the post-verdict statements of the jury in a different trial cannot be applied to an ensuing prosecution to justify counsel's failure to put on any of the crucial evidence needed for the jury to make a reliable judgment of whether the individual they face should live or die. As the district court noted, "a discussion with one of twelve jurors as to why the jury reached its decision seems an insufficient basis for a tactical decision in a trial before a different jury - particularly where the consequence of the decision may be fatal." (App. at A-111). Trial counsel failed to act as the strong advocate petitioner deserved and which the state

needed to ensure a reliable adversary proceeding. Cronic, 104 S.Ct. at 2045. The striking contrast between the investigation of counsel in Burger v. Kemp and the meager efforts of counsel in this case demonstrates that the Eighth Circuit has reached a decision that conflicts with the established constitutional standard for effective representation of counsel.

B. The Eighth Circuit misconstrued and misapplied the first prong of the Strickland v. Washington test by hypothecating reasons for trial counsel's failure to investigate and present mitigating evidence.

This Court has established a test for effective assistance of counsel which requires a two-prong showing. First, the "court must . . . determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." Strickland v. Washington, 466 U.S. at 668, 690 (1984). Second, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." 466 U.S. at 691.

This Court's approach to the first prong in Strickland v. Washington indicates the standard employed by the Eighth Circuit in the present case was inadequate to satisfy the first prong. This Court has explained the showing that must be made in order to satisfy the first prong by explaining that "[i]n other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." 466 U.S. at 691 (emphasis added). In Burger v. Kemp, 483 U.S. 776, 107 S.Ct. 3114 (1987), this Court found counsel effective only where it could point to evidence that counsel actually made a strategic judgment. 107 S.Ct. at 3126 ("having made this judgment, [counsel] reasonably determined . . .").

The Eighth Circuit in the present case, however, construed the first prong as being satisfied even though there was no evidence that counsel made a conscious decision to refrain from undertaking an investigation. Rather, the Eighth Circuit manufactured post hoc a rationale for trial counsel, concluding that counsel "could have" reasonably determined that such effort would have been futile. For example, the Eighth Circuit majority stated:

> Counsel could have well reasoned that the jury would be more harsh with [petitioner] as a result of learning that his behavior could be erratic and violent.
>
> . . . .
>
> Counsel could easily have concluded that the decision to present psychological testimony would have disastrous consequences. Skillful cross-examination could have revealed that although Laws suffered from no mental impairment that would negate responsibility for the murders he had committed, he was nonetheless a maladjusted man with a propensity for violence.
>
> . . . .
>
> [F]or counsel to have . . . raised the issue of Laws' mental state at trial could have induced cross-examination which would make counsel appear devious or unprepared.

863 F.2d at 1389 (emphasis added).

> "Trial counsel could have reasonably determined that calling Laws' relatives to the stand, after what they had told him of their feelings for Laws, would have been destructive to Laws' defense.

863 F.2d at 1391 (emphasis added).

In adopting its "hypothetical rationale" construction of the first prong of the Strickland test, the Eighth Circuit not only misconstrues the precedent of this Court, but also conflicts with other Circuit Courts of Appeal. Other Circuit Courts of Appeal have construed the first prong of the Strickland test as requiring some showing that counsel at least gave consideration to the defense he failed to pursue. For example, in Wilson v. Butler, 813 F.2d 664, 672 (5th Cir. 1987), cert. denied, 108 S.Ct. 1059 (1988), the Fifth Circuit stated that the first prong of the Strickland test could not be satisfied where there was no evidence in the record that "counsel thought about the possibility of investigation or made a strategic decision . . . ." See also, Smith v. Dugger, 840 F.2d 787, 795 (11th Cir. 1988) ("[Trial counsel's] testimony demonstrates that he conducted an extensive investigation into [petitioner's] background and made a strategic decision to forego presentation of the mitigating evidence he uncovered."); Campbell v. Kincheloe, 829 F.2d 1453, 1462 (9th Cir. 1987), cert. denied, 109 S.Ct. 380, reh. denied, 109 S.Ct. 827 (1988) (Counsel testified, "[p]resentation of those [mitigating] items in my mind would bring forth a parade of horribles that in my opinion would so far bury those factors in mitigation that any chance we had of saving his life would have been lost." In addition, another counsel testified that, "[i]t is my conclusion, after reading all of the

files and talking with Mr. Campbell and going through the case, that Mr. Campbell's activities in prison were such that anything presented about his childhood was not going to make any difference.") Trial counsel's failure to produce any information of petitioner's background or character, therefore, falls far outside the bounds of reasonable professional behavior under the first prong of the Strickland test.

Addressing the Strickland requirement for a showing of prejudice, the reasonable probability clearly exists that, but for trial counsel's failure to produce any aspect of Leonard Laws as a person to the jury, the result at trial would have been different. That reasonable probability appears by a simple comparison of this case with that of the earlier prosecution against petitioner in which trial counsel presented the jury with some information about Leonard Laws. Moreover, the evidence that petitioner's present counsel unearthed was easily obtainable and highly relevant. Trial counsel knew of petitioner's Vietnam experience. He even mentioned it in argument in mitigation, so he knew it would be relevant. (Supp.App. Ex. A at 808, lines 4-15). But he failed to introduce any evidence of the service or its effect on petitioner.

This record differs in a dispositive way from the factual record before this court in Strickland. In that case, the court held that the defense attorney was able to present to the factfinder (the trial judge) the facts relating to Strickland's financial and emotional troubles since this had come out in the defendant's colloquy with the trial court when pleading guilty. No analogous proof appears in this case. Rather the jury which sentenced petitioner heard evidence only from the state as to Petitioner's prior convictions and received no insight as to the makeup of petitioner or how he as a human being developed to the point at which the charged crimes occurred. No prejudice appeared in Strickland because the sentencing authority had the relevant information regarding that defendant. Petitioner's jury received no such information. In light of the foregoing, the Eighth Circuit's decision in this case clearly misconstrued and misapplied the Strickland v. Washington test by creating a possible rationale for trial counsel's act which has no basis in the factual record. Such a slackening of the constitutional standards established by this Court of effective representation of counsel must be corrected.

C. The Eighth Circuit misapplied the presumption of correctness under 28 U.S.C. §2254(d) as set forth in Sumner v. Mata.

In reaching its conclusion regarding the adequacy of trial counsel's investigation, the Eighth Circuit improperly applied the presumption of correctness under 28 U.S.C. §2254(d). Judge McMillian, in his dissenting opinion, succinctly identified this flaw in the majority's analysis. See Laws v. Armontrout, 863 F.2d at 1396. This Court has clearly held in Sumner v. Mata, 455 U.S. 591, 597 (1982), that only historical facts underlying trial counsel's performance are entitled to the presumption of correctness. Judge McMillian accurately summarized the historical facts in this case that are entitled to the presumption, as follows:

> [Trial counsel] reviewed the 1981 psychiatric examination but did not consider the 1974 psychiatric examination and did not speak to the psychiatrist to determine the significance of [petitioner's] diagnosis; he spoke to a woman he believed to be [petitioner's] stepmother and may have spoken to [petitioner's] brother but could not remember their names; and he talked to one (or perhaps two) jurors to determine whether the testimony of members of the community on behalf of (petitioner) was effective.

Laws v. Armontrout, 863 F.2d at 1396. No other historical facts relating to trial counsel's investigation, beyond these few, were established by the state court proceedings. The Eighth Circuit majority, however, erroneously applied the presumption of correctness to state appellate court findings concerning the supposed "fact" of the adequacy of trial counsel's representation and the supposed "fact" that trial counsel's "decision" not to put on any evidence in mitigation was "valid trial strategy." The state appellate court findings, however, were not findings of historical facts but rather were determinations of mixed questions of law and fact. Such determinations are plainly not entitled to the presumption of correctness under §2254(d). The Eighth Circuit's treatment of state appellate court findings and conclusions regarding how effective the trial counsel was rests squarely at odds with precedent of this Court. Sumner v. Mata, 455 U.S. 591 (1982). Thus, the Eighth Circuit's misapplication of the presumption of correctness to state appellate court findings requires review of this case in order to insure a uniform application of §2254(d) in cases raising ineffective assistance of counsel claims. If no review is granted, state court legal conclusions of effectiveness and adequacy will henceforth be presumed correct.

In summary, this Court should grant a writ of certiorari because the Eighth Circuit's decision in the present case is in conflict with this Court's decision in Burger v. Kemp, (2) misconstrues the first-prong of the Strickland v. Washington test for ineffective assistance of counsel, and (3) misapplies the presumption of correctness under 28 U.S.C. §2254(d) as set forth in Sumner v. Mata.

II

THE OPINION AND JUDGMENT OF THE EIGHTH CIRCUIT PLACES IT IN DIRECT CONFLICT WITH THE DECISIONS OF THE UNITED STATES COURTS OF APPEAL IN THE FIFTH, NINTH, TENTH AND ELEVENTH CIRCUITS.

One of the foremost purposes for granting a writ of certiorari is to resolve conflicts among the Circuit Courts of Appeal. See, e.g., McElroy v. United States, 455 U.S. 642, 643 (1982); Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 373 (1981). By its opinion and judgment in this case, the Eighth Circuit has created a striking conflict between it and the decisions of the Fifth, Ninth, Tenth and Eleventh Circuits in cases extremely similar to the one presently under consideration. Indeed, in light of the decisions discussed below, the courts of these circuits would have found ineffective assistance of counsel had the Laws v. Armontrout case been submitted to them.

Prior to the decision in this case, the Eighth Circuit had properly applied the standards of Strickland v. Washington, 466 U.S. 668 (1984). A carefully articulated formulation of the constitutional standard for determining the sufficiency of an investigation was set forth by the Eighth Circuit in Pickens v. Lockhart, 714 F.2d 455 (8th Cir. 1983). There, Chief Judge Lay writing for the court, stated:

> [I]t is only **after** a full investigation of **all** the mitigating circumstances that counsel can make an informed, tactical decision about which information would be the most helpful to the client's case. In the present case, it is undisputed counsel failed to make **any** investigation whatsoever. It is true counsel may choose not to investigate all lines of defense and may concentrate, for reasons of sound strategy, on another possible line of defense (citations omitted). We would not fault such a strategy if it were a reasonable choice based on sound assumptions. That is not the situation here. [Trial counsel] did not investigate into any possible mitigating evidence. He was left with no case to present. A total abdication of duty should never be viewed as permissible trial strategy. (Emphasis by the court).

714 F.2d at 1467. Had the Eighth Circuit applied this standard to the present case, it would have found ineffective assistance of counsel. The record before the court clearly

demonstrated that, in dereliction of his duty to investigate, petitioner's trial counsel failed to interview petitioner's relatives, and thus had no idea of what petitioner's father, sisters and brothers would have testified concerning his childhood, military service and subsequent personality change since returning from Vietnam. Without this information, trial counsel was absolutely devoid of the capacity to make a strategic trial decision relating to the presentation of mitigating evidence at petitioner's penalty phase. In the present case, the Eighth Circuit has also departed from its existing precedent by embracing the proposition that hearsay statements of a third party whose identity has not been verified, provides a sufficient basis upon which an attorney may make a reasonable decision to cut-short an investigation.

The new position taken by the Eighth Circuit in Laws v. Armontrout is also contrary to its own decision in Eldridge v. Atkins, 665 F.2d 228 (8th Cir. 1981), cert. denied, 456 U.S. 910 (1982). In Eldridge, the Eighth Circuit held that the petitioner had been denied effective assistance of counsel when, inter alia, his attorney failed to contact and interview witnesses who potentially possessed knowledge of material facts. The attorney had relied upon his investigator's statements that the witnesses expressed an unwillingness to cooperate if called to testify 665 F.2d at 231. Commenting upon the attorney's failure to contact these witnesses, the court stated:

> The important fact here . . . is that trial counsel made no effort to contact or subpoena either Taylor or Price immediately before or at trial. . . . **When a man's liberty is at stake, counsel owes a greater duty than to simply accept someone's hearsay statement that the witness would rather not testify.** A lawyer's duty to defend rises to a greater measure of responsibility. . . . We cannot accept trial counsel's excuse that he thought Taylor would not cooperate. Counsel need not attain perfection, but he must exercise reasonable diligence to produce exculpatory evidence.

665 F.2d at 235 (emphasis added).

The record before the court below in the case at bar demonstrated virtually nonexistent efforts undertaken by trial counsel to contact petitioner's relatives. Trial counsel contacted a woman whom he thought to be petitioner's stepmother. Trial counsel also said he may have spoken to petitioner's brother, but he was not sure of this contact. (See Supp.App. Ex. K at pp. 77-78). In either case, the record only reflected that trial counsel inquired as to whether the relative might testify. The record is absolutely devoid of any evidence demonstrating that trial counsel interviewed either of

these two people. In spite of the fact that trial counsel knew petitioner's father, two brothers and two sisters were all living in an area of rural Missouri south of St. Louis, he did not even contact the father, the other brother or petitioner's two sisters, and interviewed no one. Even more strikingly, there is no evidence that trial counsel ever asked anyone he contacted a single question concerning petitioner's personal family background and upbringing. Yet, the Eighth Circuit majority's opinion still found this to be adequate investigation, and made no attempt whatsoever at reconciling the patent inconsistency of its decision with its own precedent set forth in Eldridge v. Atkins.

Rather than follow its own established precedent in Pickens v. Lockhart and Eldridge v. Atkins, the Eighth Circuit has now departed from the standard of Strickland v. Washington and rendered a decision which sets its squarely in conflict with the decisions of the Fifth, Ninth, Tenth and Eleventh Circuits. In light of the substantial constitutional significance of ineffective assistance of counsel issues in death penalty cases, the conflict created by the Eighth Circuit's decision must be resolved by this Court in order that a uniform sixth amendment standard may be established.

A. Fifth Circuit

The decision of the Eighth Circuit in the present case is directly in conflict with the decision of the Fifth Circuit in Wilson v. Butler, 813 F.2d 664 (5th Cir. 1987). In Wilson v. Butler, the court held that the petitioner was entitled to an evidentiary hearing on the issue of ineffective assistance of counsel at the penalty phase of his capital murder trial because the petitioner demonstrated that his counsel failed to investigate and present evidence of mental impairment as a mitigating factor. 813 F.2d at 671-73. The record demonstrated that Wilson's trial counsel conducted a far more thorough investigation than petitioner Laws' counsel did in the present case. In Wilson, counsel talked with Wilson's parents and learned about problems in his childhood. In fact, the father testified concerning Wilson's childhood problems at trial. Wilson's counsel, however, did not investigate Wilson's mental history. 813 F.2d at 669. On the issue of the adequacy of counsel's investigation, the court in Wilson stated:

> [W]e find that find that [trial counsel] at least had reason to ask Wilson's parents further questions about his problems in childhood or to communicate with the foster home or any other institution known to have relevant records. Moreover, if this investigation would have revealed what Wilson now alleges, [trial counsel] would have had reason to consult with, or have Wilson examined by, a competent psychiatrist or psychologist.

813 F.2d at 671.

The Wilson court also addressed the issue of whether trial counsel made a reasonable professional decision not to pursue investigation of Wilson's mental history. On this point, the court found that trial counsel's "affidavit does not assert that he thought about the possibility of an investigation or made a strategic decision, and neither the state's brief nor the district court opinion suggest any factual support for that thesis." 813 F.2d at 672. As a result, the court found that the first prong of the Strickland v. Washington test was satisfied. Further, the court determined that the testimony of Wilson's father concerning petitioner's mental history did not overcome the showing of prejudice resulting from the absence of other testimony about Wilson's mental condition. Thus, the court found that the evidence made a sufficient showing of prejudice to warrant an evidentiary hearing on Wilson's claim of ineffective assistance of counsel. 813 F.2d at 673.

Comparing the investigation undertaken by counsel for Wilson to the virtually non-existent investigation of Laws' trial counsel in the present case, it is evident that the Fifth Circuit would find that trial counsel's failure to interview Laws' relatives or investigate Laws' mental history and military service records constituted constitutionally deficient representation under Strickland v. Washington.

B. Ninth Circuit

The Eighth Circuit is also in conflict with the decision of the Ninth Circuit in Evans v. Lewis, 855 F.2d 631 (9th Cir. 1988). In Evans, the Ninth Circuit held that counsel's failure to investigate petitioner's history of mental problems was constitutionally deficient representation which prejudiced the petitioner. After setting forth the standards outlined in Strickland v. Washington, the court concluded that Evans' attorney should have investigated the possibility of advancing mental impairment as a mitigating factor. Documents available to Evans' attorney plainly indicated that Evans had a history of mental problems. The court found that "despite this information, counsel conducted no investigation to ascertain the extent of any possible mental impairment." 855 F.2d at 636. In addition, the court held that counsel's failure to investigate Evans'

mental condition could not be construed as a trial tactic since Evans' attorney presented no evidence of mitigation. 855 F.2d at 673.

Under the approach taken by the Ninth Circuit in Evans, the meager efforts at investigation undertaken by petitioner's counsel in the present case constitute ineffective assistance of counsel. While Laws' trial counsel considered the question of petitioner's mental capacity as a potential defense to the murder charge, the record does not support a finding that counsel gave any consideration to the evidence of Laws' mental history as a potential factor in mitigation of the death penalty. Further, even though counsel was aware that Laws served in Vietnam, he made no effort to investigate Laws' military service and consequently did not discover the evidence of Laws' significant personality change after returning from Vietnam. Moreover, it is evident that the Evans court would not find counsel's failure to investigate Laws' background, including military service and mental history, to be a trial tactic since, as in Evans, counsel presented no evidence whatsoever in mitigation of the death penalty. Thus, comparing Evans v. Lewis to the case at bar, it is clear that the Eighth Circuit's decision is in direct conflict with that of the Ninth Circuit.

C. Tenth Circuit

The opinion of the Eighth Circuit in Laws v. Armontrout is also squarely in conflict with the decision of the Tenth Circuit in Coleman v. Brown, 802 F.2d 1227 (10th Cir. 1986), cert. denied, 107 S.Ct. 2491, reh. denied, 107 S.Ct. 3279 (1987). The court in Coleman stated, "In a capital case the attorney's duty to investigate all possible lines of defense is strictly observed." 802 F.2d at 1233. Coleman's trial counsel did not interview a possible alibi witness brought to his attention by the petitioner. The court concluded "[i]n light of the strong case against Coleman and the seriousness of the charges, it was improper for his attorney to fail to investigate what was perhaps Coleman's sole line of defense." 802 F.2d at 1234. Thus, the court held that the actions of Coleman's counsel fell below the constitutional standards demanded by the first prong of the Strickland v. Washington test. Because the petitioner did not present to the court the name of the alibi witness, nor evidence of what testimony the witness would have offered, the court found that the petitioner was not prejudiced by trial counsel's constitutionally deficient investigation.

In analyzing the present case under the court's approach in Coleman v. Brown, it is evident that the Tenth Circuit would have found that both the failure of Laws' trial counsel to interview petitioner's relatives and to investigation petitioner's psychiatric history and military service constituted deficient representation and that petitioner was prejudiced by trial counsel's deficient representation because the facts set forth in the statements of Laws' relatives and in his military and psychiatric records, if presented to the jury during the preliminary phase, would likely have resulted in a different sentence. The factual basis for this finding of prejudice is readily apparent in the record because petitioner presented not only the names of the relatives who could have been interviewed but also evidence of what testimony they would have offered. Thus, the Eighth Circuit's opinion in the present case is a conflict with the decision of the Tenth Circuit in Coleman v. Brown.

D. Eleventh Circuit

The aberrant nature of the Eighth Circuit's decision in the case at bar is most keenly exposed by a series of decisions of the Eleventh Circuit in which that court has consistently held, under facts extremely similar to the case at bar, that trial counsels meager efforts at investigating potential mitigating evidence in a capital murder case were both constitutionally below the professional norms of competent representation and that the deficient representation prejudiced the petitioners. See Middleton v. Dugger, 849 F.2d 491 (11th Cir. 1988); Stephens v. Kemp, 846 F.2d 642 (11th Cir. 1988); Tyler v. Kemp, 755 F.2d 741 (11th Cir.), cert. denied sub nom, James v. Tyler, 474 U.S. 1026 (1985); King v. Strickland, 748 F.2d 1462 (11th Cir. 1984), cert. denied, 471 U.S. 1016 (1985).

In a most recent case, Middleton v. Dugger, 849 F.2d 491 (11th Cir. 1988), the Eleventh Circuit held that Middleton's trial counsel failed to conduct a reasonable investigation into mitigating circumstances and consequently did not discover and present such evidence at the penalty phase of his capital case. The court found that "trial counsel had no valid tactical reasoning behind his failure to perform a background investigation for possible mitigating evidence. . . ." 849 F.2d at 494. Finally, the court concluded that "the record amply supports the district court's conclusion that a

reasonable probability existed that the result of the sentencing proceeding would have been different if the judge and jury had been given this evidence." 849 F.2d at 495.

In Stephens v. Kemp, 846 F.2d 642 (11th Cir.), reh. denied, 849 F.2d 1480, cert. denied 109 S.Ct. 189 (1988)), the Eleventh Circuit once again vacated the death penalty and ordered a rehearing on petitioner's sentencing on the grounds that trial counsel failed to provide effective assistance of counsel at the penalty phase of petitioner's murder trial. The other court stated:

> Our reading of the record convinces us that under the circumstances of this case, trial counsel's failure to investigate, present and argue to the jury at sentencing, any evidence of appellant's mental history and condition constituted error "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland v. Washington.

846 F.2d at 652. The court in Stephens reached this conclusion in spite of the fact that trial counsel put on evidence of petitioner's mental condition through the testimony of his mother. The court noted that "the fact that others did not [testify] undoubtedly diminished the impact on the jury of the facts [the mother] described." 846 F.2d at 654. It is evident from the records in Stephens that trial counsel conducted an interview of petitioner's mother and presented some mitigating evidence from petitioner's background during the penalty phase. Indeed, the Eleventh Circuit found both trial counsel's investigation and presentation of evidence at the penalty phase to fall short of the constitutional standards articulated in Strickland v. Washington. Thus, it is impossible to reconcile the Eleventh Circuit's decision in Stephens with the Eighth Circuit's decision in Laws v. Armontrout.

In yet another Eleventh Circuit case, Tyler v. Kemp, 755 F.2d 741 (11th Cir. 1985), the court found ineffective assistance of counsel that warranted vacating a death penalty where trial counsel failed to present mitigating evidence that was available both from the petitioner's family and other sources. In Tyler trial counsel had interviewed defendant's family members, but the relatives indicated that they did not want to testify or get involved. Trial counsel, however, did not tell the relatives that testimony was needed at the sentencing phase of the trial. The court noted:

> They [the relatives] testified that they would have been willing to appear as mitigating evidence witnesses had they understood that such testimony was useful and needed, and they described various mitigating factors they would have covered in testimony. [Trial counsel's] own testimony reveals that at no time did he discuss with the family members the need for their testimony in mitigation. Rather, so far as the family members knew from him, once they declined to testify because they knew nothing about the killing, the matter of their testifying ended.

755 F.2d at 745. The facts of Tyler are virtually identical to the case at bar. Laws' trial counsel testified at the Rule 27.26 hearing in the state court, that the one or possibly two people he contacted both indicated that they did not wish to testify. Nothing in the record suggests that trial counsel explained the need for testimony at the sentencing phase or even asked one question of these two individuals regarding Laws' family or personal background. Thus, under the Eleventh Circuit's decision in Tyler, trial counsel's investigation in the present case clearly failed to rise to the constitutionally-required level of effectiveness.

Finally, in King v. Strickland, 748 F.2d 1462 (11th Cir. 1984), cert. denied, 471 U.S. 1016 (1985), the Eleventh Circuit found that the two-prong test of Strickland v. Washington was met by the deficient and prejudicial performance of trial counsel at the sentencing hearing on the grounds that trial counsel did not make a reasonable investigation before determining not to present mitigating evidence. In King, counsel did not discuss his client's background, nor had counsel searched carefully for mitigating evidence. 748 F.2d at 1464. King's counsel also failed to present testimony from available character witnesses in mitigation of the death penalty. Id.

The Middleton, Stephens, Tyler and King cases demonstrate that the Eleventh Circuit has consistently found ineffective assistance of counsel when it has been presented with facts substantially similar to those set forth in the case at bar. Consequently, the decision of the Eighth Circuit in Laws v. Armontrout is squarely at odds with the decisions of the Eleventh Circuit. Thus, a writ of certiorari to the United States Court of Appeals for the Eighth Circuit is appropriate so that this Court may resolve the conflict between the circuits created by the Eighth Circuit's decision in the present case.

CONCLUSION

For the foregoing reasons, this Court should enter an order granting a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

Respectfully Submitted,

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APPENDIX

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 87-1018

Leonard Marvin Laws,

Appellee,

v.

Bill Armontrout,

Appellant.

Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: July 12, 1988

Filed: December 20, 1988

Before LAY, Chief Judge, HEANEY, McMILLIAN, ARNOLD, JOHN R. GIBSON, FAGG, BOWMAN, WOLLMAN, MAGILL, and BEAM, Circuit Judges, en banc.

MAGILL, Circuit Judge.

The State of Missouri appeals from the district court's grant of habeas corpus relief to Laws. The district court vacated Laws' death sentence after concluding that Laws had received ineffective assistance of counsel during the punishment phase of his trial. We reverse and reinstate the sentence, finding no valid claim of ineffectiveness of trial counsel.

We deal here with a defendant who conspired to and did commit three separate and distinct robberies and murders on

elderly and helpless victims. He claims ineffectiveness here only in the penalty phase of the trial for the second set of murders.

The claim of ineffectiveness involves a criminal defense attorney whom the record describes as excellent and experienced. He had been licensed to practice law in Missouri since 1975. After serving as a law clerk in the Missouri Court of Appeals and an assistant prosecuting attorney in St. Louis County for two years, he entered private practice, where, according to his estimate, ninety-five percent of his work was in criminal law. He handled approximately fifty felonies a year, and at the time of the hearing, had tried between twenty-five and thirty jury trials, as well as having briefed and argued criminal appeals. He represented Laws in both trials: for the first murder (Elliott) and the two later murders (Williams). He spoke with Laws for six or more hours before the Elliott trial, and spent additional time with him before the Williams trial. He further estimated that he spent about four hundred hours preparing for the two murder trials, which involved substantial overlap in witnesses and preparation. The chief trial attorney for the St. Louis Public Defender's office testified at the ineffectiveness hearing that Laws' trial counsel had "an excellent reputation" as a defense lawyer in the community.

I. BACKGROUND.

In October of 1980, Leonard Laws was living in a two-room house trailer with George Clifton Gilmore, Gilmore's brother Norman, and several others in the Gilmore family. All three men were unemployed and impoverished. George Gilmore suggested to his brother and Laws that they could make money easily by robbing old people and then killing them to prevent identification. The trio bought shotguns and a rifle on October 8, 1980. This was one day after the Elliott murder (described in fn. 1), when they

were flush with $4,600 cash from decedent Elliott's mason jar.

In the early morning of October 29, 1980, they went to the home of Clarence and Lottie Williams, whom the Gilmores had known through an uncle. Mr. Williams was eighty-three years old and his wife was eighty-one. The assailants entered the Williams' home after Laws cut the telephone line, and tied Mr. and Mrs. Williams up in chairs. Laws threatened to cut off their fingers if they would not reveal where they kept their money. They complied, and the three men ransacked the house. Mr. and Mrs. Williams were then untied and taken into the bedroom. George Gilmore prepared to kill them with his twelve-gauge shotgun, and Laws suggested instead: "Let me hit them in the head with a ball bat." Gilmore, however, told Laws to go stand outside and see if he could hear the shotgun blasts, and Laws complied. Gilmore then shot Mrs. Williams, reloaded the weapon, then shot Mr. Williams. The first shot failed to kill Mr. Williams, and he tried to run toward the front door, so Gilmore shot him a second time, killing him. Laws then reentered the house. After removing property, the trio poured fuel oil on the floor, which Laws ignited. The fire substantially destroyed the house.

II. PRIOR PROCEEDINGS.

Laws received a four-day trial in St. Louis County, Missouri Circuit Court in July of 1982. A jury found him guilty of two counts of capital murder. The punishment phase of the case began on the morning of July 23, 1982, before the same jury. During this phase the State introduced evidence, through certified copies of judgments, that Laws had been convicted of two separate capital murders in Missouri[1] (for which he received life sen-

[1] See State v. Laws, 668 S.W.2d 234 (Mo. App. 1984); State v. Laws, 699 S.W.2d 102 (Mo. App. 1985). In the first case, Laws and the Gilmore brothers decided to rob Woodrow Wilson Elliott on the night of October 7, 1980. Elliott was an old man who lived

tences), two armed robberies in Arizona (concurrent five to six-year sentences), and one aggravated assault in Mississippi (eleven-year sentence). Laws was imprisoned in March of 1982 in the Missouri State Penitentiary for his first Missouri murder conviction, and he has been incarcerated ever since. Laws had previously spent over six years in prison on the armed robbery and aggravated assault convictions before being paroled. Laws' lawyer introduced no evidence of mitigating circumstances.[2] The

alone and had no legs and only one arm. The trio drove to Mr. Elliott's house and when he answered the door, Laws kicked him, jumped on him, and choked him into unconsciousness. They then ransacked the house, during which time Laws stabbed Mr. Elliott in the back of the head. Before leaving with their loot, they set fire to Mr. Elliott's home. The three might not have been arrested if Laws had not demonstrated to Gilmore's relatives "how he had stabbed Mr. Elliott, and laughing, said words to the effect that Elliott had had such a hard head that it bent his knife." Judge Snyder of the Missouri Court of Appeals wrote: "A more dastardly crime could scarcely be imagined." Laws, 668 S.W.2d at 237. In the second case, the evidence showed that in the early morning of December 29, 1980, Laws broke into a shed belonging to Mrs. Elizabeth Roderique. He took a gasoline can from the shed into Mrs. Roderique's home, carried the gasoline into her bedroom, and set her house on fire. Mrs. Roderique's body was found on the remains of her bed, but the body was so badly charred and burned that the cause of death could not be determined by autopsy. Laws, however, admitted that he had killed her. Laws, 699 S.W.2d at 103-04.

[2] In capital murder cases, Missouri law directs the judge to consider, or to include in his instructions to the jury for it to consider, circumstances relevant to the crime which tend to aggravate or mitigate its severity. Mo. Rev. Stat. § 565.012 (1982) provides a list of aggravating and mitigating circumstances and also directs consideration of any aggravating or mitigating circumstances otherwise authorized by law. The statute further provides that the death penalty shall not be imposed unless at least one of the listed statutory aggravating circumstances is found. § 565.012.5. In this case the jury found the following four statutory aggravating circumstances were present:

(1) "The defendant has a substantial history of serious assaultive convictions." (§ 565.012.2(1)).

(2) "The murder of each victim was committed while the

trial court nonetheless gave the jury an instruction which directed it to consider mitigating circumstances.[3] The jury

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defendant was engaged in the commission of capital murder of the other victim." (§ 565.012.2(2)).

(3) "The defendant murdered Lottie and Clarence Williams for the purpose of receiving money or any other thing of monetary value." (§ 565.012.2(4)).

(4) "The murders of Lottie and Clarence Williams involved depravity of mind and that as a result thereof it was outrageously wanton and horrible." (§ 565.012.2(7)).

Tr. Vol. II at 813-14.

On appeal the Missouri Supreme Court did not decide whether the last circumstance was supported by the evidence, because it found that the first three were soundly established by the evidence. State v. Laws, 661 S.W.2d 526, 532 (Mo. banc 1983), cert. denied, 467 U.S. 1210 (1984).

[3]Instruction No. 30, read as follows:

If you decide that a sufficient aggravating circumstance or circumstances exist to warrant the imposition of death, as submitted in Instruction No. 28, it will then become your duty to determine whether a sufficient mitigating circumstance or circumstances exist which outweigh such aggravating circumstance or circumstances so found to exist. In deciding that question you may consider all of the evidence relating to the murders of Clarence and Lottie Williams.

You may also consider

1. Whether the defendant was an accomplice in the murder of Clarence or Lottie Williams and whether his participation was relatively minor.

2. Whether the defendant acted under extreme duress or substantial domination of another person.

You may also consider any circumstances which you find from the evidence in extenuation or mitigation of punishment.

If you unanimously decide that a sufficient mitigating circumstance or circumstances exist which

returned a verdict calling for the death penalty. Laws' motion for a new trial was overruled on September 17, 1982, and he was sentenced to death on each count of capital murder. Laws appealed, represented by new counsel, but the conviction and sentence were affirmed in full. State v. Laws, 661 S.W.2d 526 (Mo. banc 1983), cert. denied, 467 U.S. 1210 (1984). Rehearing was denied on December 20, 1983. Laws then filed a pro se motion pursuant to Mo. S.Ct. R. 27.26, alleging ineffective assistance of counsel.[4] New counsel was appointed for him, and on Novem-

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outweigh the aggravating circumstance or circumstances found by you to exist, then you must return a verdict fixing defendant's punishment at imprisonment for life by the Division of Corrections without eligibility for probation or parole until he has served a minimum of fifty years of his sentence.

[4]At the time Laws filed his motion, Missouri Supreme Court Rule 27.26 provided in pertinent part:

A prisoner in custody under sentence and claiming a right to be released on the ground that such sentence was imposed in violation of the Constitution and laws of this State or the United States, or that the court imposing such sentence was without jurisdiction to do so, or that such sentence was in excess of the maximum sentence authorized by law or is otherwise subject to collateral attack, may file a motion at any time in the court which imposed such sentence to vacate, set aside or correct the same. Unless the motion and the files and records of the case show to the satisfaction of the court that the prisoner is entitled to no relief, the court shall cause notice thereof to be served on the prosecuting attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction or that the sentence imposed was illegal or otherwise subject to collateral attack, or that there was such a denial or infringement of the constitutional rights of the prisoner as to render the judgment subject to collateral attack, the court shall vacate and set aside the judgment and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

ber 16, 1984, an evidentiary hearing was held on the Rule 27.26 motion before a different judge from the one who presided over Laws' trial. The court found no showing of incompetence by Laws' trial counsel, and Laws appealed. The Missouri Court of Appeals affirmed the denial of relief. Laws v. State, 708 S.W.2d 182 (Mo. App. 1986). The court denied Laws' motions for rehearing and for transfer on March 25, 1986 and May 13, 1986. He then unsuccessfully petitioned the Supreme Court for certiorari. Laws v. State, 107 S.Ct. 246 (1986).

Thus, after eight unsuccessful attempts in the state court system, four of them alleging ineffective assistance of counsel, Laws began the federal attack upon his sentence. He filed a pro se petition for writ of habeas corpus in the district court pursuant to 28 U.S.C. § 2254. Counsel was appointed for him, and he raised two arguments in his amended petition.

He first argued that his court-appointed attorney's failure to offer evidence in mitigation during the punishment phase of his trial[5] denied him effective assistance of trial counsel in violation of the sixth and fourteenth amendments. In support of this contention, he argued that significant mitigating evidence should have been investigated and presented. For instance, Laws had an honorable service record in Vietnam. Also, hospital psychiatric records and family testimony showed that his experiences in Vietnam caused him severe psychological damage.

Laws also argued that the imposition of the death penalty violated his eighth and fourteenth amendment rights because he

[5]To avoid potential confusion, we note that although Laws had a total of four separate counsel representing him on his various motions and appeals, his only claim of ineffectiveness of counsel is against his Missouri trial attorney, and he alleges ineffective assistance only during the penalty phase, not the guilt phase, of his trial.

was an accomplice with no direct role in the killing. Laws sought a new trial of the punishment phase of his trial only. He did not raise issues regarding his counsel's handling of the culpability phase of his trial. In an unpublished memorandum opinion, the district court granted Laws' habeas corpus petition and vacated his two consecutive death sentences, giving the State the opportunity to retry the punishment phase of the case.[6]

III. STANDARD OF REVIEW.

When considering an appeal from the granting of habeas corpus relief on the ground of ineffective assistance of counsel, this court may engage in its own independent review of the district court's conclusion, because the issue of ineffective assistance of counsel presents a mixed question of law and fact. Martin v. McCotter, 796 F.2d 813, 817 (5th Cir. 1986), cert. denied, 107 S.Ct. 935 (1987); Reiger v. Christensen, 789 F.2d 1425, 1427 (9th Cir. 1986). If a state court has rendered specific predicate factual findings, those findings should be presumed correct unless conditions exist which cast those findings into doubt. 28 U.S.C. § 2254(d); Sumner v. Mata, 449 U.S. 539 (1981); Martin, 796 F.2d at 817. The district court's findings of fact, however, are reviewable under the clearly erroneous standard. Fed. R. Civ. P. 52(a); Morrow v. Parratt, 574 F.2d

[6]The district court based its decision on Laws' ineffectiveness claim and declined to reach his eighth amendment claim, which argued essentially that because he was not the triggerman, the death penalty was inappropriate. Laws' eighth amendment claim is not before us on appeal. We note nevertheless that the Supreme Court's recent decision in Tison v. Arizona, 107 S. Ct. 1676 (1987), is dispositive of this issue. In Tison the Supreme Court held that the eighth amendment does not prohibit the death penalty as disproportionate in the case of a defendant who, even though he neither intends to kill the victims nor inflicts the fatal wounds, nonetheless shows major participation in the felony which results in murder and has a mental state of reckless indifference to the value of human life.

411, 413 (8th Cir. 1978); see also Martin, 796 F.2d at 817.

IV. DISCUSSION.

The State points to a number of flaws in the district court's opinion. We find two of these flaws sufficient to mandate reversal.

First, although it is unclear whether the district court intended to do so, it appeared to set out an erroneous legal test that departs from the standard for determining ineffective assistance of counsel that the Supreme Court set out in Strickland v. Washington, 466 U.S. 668 (1984). Second, the district court's conclusion that Laws received ineffective assistance of counsel was not supported by the state court factual findings.

A. Erroneous Legal Test for Ineffectiveness of Counsel.

The State argues that the district court wrongly established a per se rule by holding that trial counsel is ineffective whenever a defendant receives the death penalty after counsel offers no evidence in mitigation. The State argues that such a per se rule flies in the face of both Strickland v. Washington, 466 U.S. 668 (1984), and Darden v. Wainwright, 477 U.S. 168 (1986), because in both cases no mitigating evidence was offered in the punishment phase, yet the Court upheld both death sentences. Having examined the district court's analysis and the applicable cases, we agree with the State.

The district court found that counsel's decision not to present mitigating evidence was based on: (1) his belief that a jury would not impose the death penalty since Laws had not directly participated in the killings; (2) his discussion with a juror from Laws' earlier capital murder case indicating that the jury had decided not to impose the death penalty because of a deal, also applicable to this case, the State had made with

Gilmore; and (3) his phone conversations with one of Laws' brothers and a woman he thought was Laws' stepmother. The court found that these three factors did not represent:

> a reasonably thorough investigation into petitioner's character and background or into other information potentially relevant to mitigating circumstances. The record does not reflect counsel's investigation of petitioner's military or psychiatric background for purposes of the punishment phase of the trial. Nor does the record reflect a responsible effort to glean available relatives' own knowledge of and relationship to petitioner * * * .

Mem. Op. at 22.

Calling counsel's decision to offer no evidence at the penalty phase "a bold tactic," the court stated that: "Had it succeeded, its brilliance may have been unquestioned. Having failed, it must be considered beyond the bounds of professional norms." The court concluded:

> Trial counsel may well believe he had reasonable grounds for the decision he reached in the death penalty phase of this cause. Nonetheless, that decision was wrong. * * * To a certain extent, we risk developing a body of law that says at the death penalty phase defense counsel must introduce some evidence or be found ineffective, while it is certainly possible and sometimes probable that putting on and offering evidence may worsen the client's chances. Perhaps this ruling stresses only the importance of fully investigating each case on its merits before deciding that as a matter of reasonable strategy, no evidence should be introduced.

Mem. Op. at 25.

Although the district court's conclusion may purport not to create a new rule in this area of the law, we nonetheless think that the court's reasoning is inconsistent with Supreme Court precedent, specifically, the Strickland and Darden decisions.

The district court's analysis is incorrect because the test set out in Strickland for determining whether counsel has functioned effectively is not outcome-determinative. The fact of conviction alone does not necessarily indicate that a defendant received ineffective assistance of counsel. As Strickland and Darden make clear, the decision not to present evidence at the penalty phase is well within the range of practical choices that are not to be second-guessed, as long as they are based on informed and reasoned judgment.

Strickland involved a challenge to counsel's handling of the sentencing portion of a death penalty capital murder case. To prepare for the sentencing hearing before the judge, counsel spoke to the defendant about his background. He also spoke on the telephone with defendant's wife and mother, though he did not follow up on one unsuccessful effort to meet with them. He did not otherwise seek out character witnesses. Nor did he request a psychiatric examination, since his conversations with the defendant gave no indication that the defendant had psychological problems. Counsel decided not to present and hence not to look further for evidence concerning the defendant's character and emotional state. Counsel's rationale was, in part, that by foregoing the opportunity to present new evidence on these subjects, he prevented the State from cross-examining the defendant on his claim and from putting on psychiatric evidence of its own. At the sentencing hearing, counsel's strategy was based primarily on the trial judge's prior remarks and his reputation as a sentencing judge who thought it important for a convicted defendant to own up to his crime. Counsel argued that the defendant's remorse and acceptance of responsibility for his crime, his total lack of prior criminal conduct, the fact that he surrendered, confessed, offered to testify against a co-defendant, and the fact that he was a good person gone wrong under stressful circumstances all combined to justify sparing him from the death penalty. The strategy failed, and the trial judge sentenced the defendant to death.

The Supreme Court found that defendant's counsel had not been ineffective. Counsel had made:

> a strategic choice to argue for the extreme emotional distress mitigating circumstance and to rely as fully as possible on respondent's acceptance of responsibility for his crimes. * * * Counsel's strategy choice was well within the range of professionally reasonable judgments, and the decision not to seek more character or psychological evidence than was already in hand was likewise reasonable. * * * The aggravating circumstances were utterly overwhelming. Trial counsel could reasonably surmise from his conversations with respondent that character and psychological evidence would be of little help. * * * On these facts, there can be little question, even without application of the presumption of adequate performance, that trial counsel's defense, though unsuccessful, was the result of reasonable professional judgment.

Strickland, 466 U.S. at 699. (Emphasis added.)

Darden v. Wainwright, 477 U.S. 168 (1986), presented a similar scenario. In Darden, a Florida defendant who had been sentenced to death for murder argued that he was denied effective assistance of counsel at the sentencing phase of trial. He argued that his team of trial counsel did not delve sufficiently into his background, and as a result were unprepared to present mitigating evidence at the sentencing hearing. Counsel knew that they were free to offer mitigating evidence, yet they chose not to do so. The Court, noting that Strickland requires judicial scrutiny of counsel's performance to be highly deferential, stated:

> In this case, there are several reasons why counsel reasonably could have chosen to rely on a simple plea for mercy from petitioner himself. Any attempt to portray petitioner as a non-violent man would have opened the door for the State to rebut with evidence of petitioner's prior convictions. * * * In addition, * * * the State could have responded with a psychiatric report * * *. In sum, petitioner has not "overcome the presumption that, under the circumstances, the chal-

> lenged action 'might be considered sound trial strategy.'" * * * Petitioner has failed to satisfy the first part of the Strickland test, that his trial counsels' performance fell below an objective standard of reasonableness.

Darden, 477 U.S. at 186-87, quoting Strickland, 466 U.S. at 689.

The Supreme Court recently reaffirmed this standard in Burger v. Kemp, 107 S.Ct. 3114 (1987). In Burger, a Georgia jury found the defendant guilty of murder and sentenced him to death. The Supreme Court, noting the high degree of deference given to counsel on a claim of ineffectiveness, rejected the defendant's contention that his trial counsel had been ineffective for failing to develop and present any mitigating evidence at either of the two sentencing hearings.

In Burger, a search for mitigating evidence would have disclosed that the defendant had an unhappy and unstable childhood. Trial counsel was aware of some, but not all, of this family history before trial. After speaking with the defendant's mother, his psychologist, and others, counsel "made the reasonable decision that his client's interest would not be served by presenting this type of evidence." Burger, 107 S.Ct. at 3124. Counsel decided not to put the defendant's mother on the stand because her testimony might have been counterproductive, and the Court noted that "it was surely not unreasonable for [counsel] to have concluded that cross-examination might well have revealed matters of historical fact that would have harmed his client's chances for a life sentence." Id. at 3125. The Court concluded:

> The record at the habeas corpus hearing does suggest that [counsel] could well have made a more thorough investigation than he did. Nevertheless, in considering claims of ineffective assistance of counsel, "[w]e address not what is prudent or appropriate, but only what is constitutionally compelled." United States v. Cronic, 466 U.S. 648, 665, n.38 (1984). We have decided

> that "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Strickland, 466 U.S., at 690-691. Applying this standard, we agree with the courts below that counsel's decision not to mount an all-out investigation into petitioner's background in search of mitigating circumstances was supported by reasonable professional judgment. It appears that he did interview all potential witnesses who had been called to his attention and that there was a reasonable basis for his strategic decision that an explanation of petitioner's history would not have minimized the risk of the death penalty. Having made this judgment, he reasonably determined that he need not undertake further investigation to locate witnesses who would make statements about [the defendant's] past.

Id. at 3125-26.

Applicable circuit court decisions are in accord. See Lightbourne v. Dugger, 829 F.2d 1012, 1025-26 (11th Cir. 1987); Robison v Maynard, 829 F.2d 1501, 1504-05 (10th Cir. 1987); Bell v. Lynaugh, 828 F.2d 1085, 1089-90 (5th Cir.), cert. denied, 108 S.Ct. 310 (1987); Brock v. McCotter, 781 F.2d 1152, 1160 (5th Cir.), cert. denied, 476 U.S. 1153 (1986).[7]

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[7]The Brock court rejected an outcome-determinative analysis as follows:

> We believe that Brock's inconsistent analysis perfectly illustrates the discretionary nature of defense counsel's task. There are significant risks which inhere in any tactic adopted by the defense. The question we must answer is not whether defense counsel's tactics produced damage but, rather, whether those tactics were unreasonably risky.

Brock, 781 F.2d at 1160. The court went on to hold that counsel was not ineffective for introducing evidence of petitioner's drug use and troubled childhood. The court noted that this information, like Laws' family testimony or information pertaining to his personality, is susceptible to dual interpretation.

Laws points to a number of cases in which counsel was found ineffective for having failed to present mitigating evidence. In these cases, however, the key to the findings of ineffectiveness was not that mitigating evidence was not presented, but that counsel, as a result of inadequate preparation, had failed to discover the evidence. Contrary to the district court's apparent reasoning in this case, the absence of mitigating evidence does not inexorably lead to a conclusion of ineffective counsel. One must look further and determine why the mitigating evidence was not produced. If counsel has through neglect failed to discover such evidence, then counsel will be found ineffective. If, however, counsel did not produce the mitigating evidence because, after a reasonable investigation and exercise of professional judgment, he has determined that withholding such evidence is the more strategically sound course, then there has been no ineffectiveness.[8]

Kimmelman v. Morrison, 106 S.Ct. 2574 (1986), cited by Laws, supports this view. In Kimmelman, the defendant was indicted for rape. Among the items of evidence used at trial was a stained bed sheet, which was obtained from defendant's apartment without a search warrant. At trial, counsel objected to the introduction of the sheet and testimony concerning it. State law, however,

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[8]The district court appears to have rested its decision on two bases. The first basis, as we have discussed, is that because counsel presented no evidence in mitigation, he was therefore ineffective. However, as we note, the correct test is not whether there was no mitigating evidence, but rather, whether the lack of mitigating evidence was the result of adequate investigation and sound strategy. The district court also appeared to conclude, as a second, independent basis for decision, that even under the established Strickland test, counsel was ineffective for having conducted inadequate investigation. As we discuss in Section IV(B) of this opinion, we think the district court's analysis on this ground was also incorrect.

required that suppression motions be filed within thirty days of the indictment. Because the time limit had long since passed, the trial judge denied the motion. Ultimately, defendant was convicted. The Supreme Court observed that trial counsel "failed to file a timely suppression motion, not due to strategic considerations, but because, until the first day of trial, he was unaware of the search and of the State's intention to introduce the bedsheet into evidence." Kimmelman, 106 S.Ct. at 2588. Counsel was unaware of the search and seizure because he had failed to conduct any pretrial discovery. Again, this failure was not based on strategy, but on counsel's erroneous belief that the State was obligated to turn over inculpatory evidence to the defense before trial and that the victim's preferences would determine whether the State proceeded to trial after an indictment had been returned. The Court found that counsel's failure to conduct any discovery was "unreasonable, that is, contrary to prevailing professional norms. * * * Respondent's lawyer neither investigated, nor made a reasonable decision not to investigate, the State's case through discovery." Counsel had a "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Kimmelman, 106 S.Ct. at 2588-89.

Laws also cites Morrow v. Parratt, 574 F.2d 411 (8th Cir. 1978); Eldridge v. Atkins, 665 F.2d 228 (8th Cir. 1981), cert. denied, 456 U.S. 910 (1982); and Woodard v. Sargent, 806 F.2d 153 (8th Cir. 1986). As in Kimmelman, however, these cases stand for the proposition that inadequate trial preparation and investigation equal ineffective assistance of counsel, not the fact, standing alone, that potentially mitigating evidence is not introduced. In Morrow, the court found that the defendant's lawyer had failed adequately to investigate the facts before advising his client to plead guilty and had failed to interview eyewitnesses to the crime. The court concluded: "In summary, the evidence described above could have been uncovered by a reason-

able investigation by Morrow's attorney." Morrow, 574 F.2d at 414.

In Eldridge, defense counsel did not interview any of the eyewitnesses to the robbery. "Counsel did not investigate because he conclusorily decided that Eldridge was guilty and that further investigation would not do any good." Eldridge, 665 F.2d at 235. Noting also that counsel's failure to use certain witnesses was not so much trial strategy as it was an accommodation to his own inadequate trial preparation, the court concluded that: "Counsel need not attain perfection, but he must exercise reasonable diligence to produce exculpatory evidence." Id.

Finally, in Woodard, a capital murder case, counsel was found ineffective for failing to request a jury instruction on a new mitigating circumstance which had been added to the pertinent statute shortly before the case was tried. The jury found two aggravating circumstances and no mitigating circumstances. Accordingly, the court found:

> A finding of a mitigating circumstance should have been an important objective in Woodard's case, and the failure to seek the inclusion of this obvious mitigating circumstance certainly fell below the threshold of reasonably competent assistance. * * * [W]e can conceive of no possible tactical reason for such an omission.

Woodard, 806 F.2d at 157.

As these cases show, it is not the failure to present mitigating circumstances, but rather the reasons for the failure to present mitigating circumstances, that are the proper subject for judicial scrutiny. Therefore, we hold that the district court erred in setting out a per se rule in this regard.

B. Whether the District Court's Assessment of the Evidence was Erroneous.

Even if the district court had not created a framework for analysis that departs from established Supreme Court precedent (see supra section IV(A) of this opinion), we think the district court's assessment of the evidence, even under the correct standards, would mandate reversal. The district court concluded, applying the Strickland standards, that counsel had made an inadequate investigation and was thus ineffective. We believe this conclusion was contrary to the evidence. Presuming as we must the state court's factual findings to be correct, as required by 28 U.S.C. § 2254(d),[9] we are compelled to conclude that Laws received effective assistance of counsel.

Laws' arguments which the district court considered are as follows:

(1) Trial counsel failed adequately to investigate or introduce any evidence concerning Laws' mental state;

(2) Trial counsel failed to contact members of Laws' family so that they could testify on his behalf; and

(3) Trial counsel failed to present testimony from a statistician, priest and/or psychologist in opposition to the imposition of the death penalty.

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[9]The State argues that the state court's factual findings, which are supported by the record, are entitled to the presumption of correctness mandated by 28 U.S.C. § 2254(d). Laws argues, however, that the presumption of correctness is inapplicable because material facts were not adequately developed at the state court hearing, 28 U.S.C. § 2254(d)(3), and because the state court's factual determinations are not fairly supported by the record reviewed as a whole by the federal court, 28 U.S.C. § 2254(d)(8). We conclude, however, that Laws' arguments in this regard are belied by the record, which shows that material facts were adequately developed and had fair support in the record.

We consider each issue in turn. Our analysis is governed by Strickland v. Washington, 466 U.S. 668 (1984). Under Strickland, a petitioner alleging ineffective assistance of counsel must prove two independent components:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland, 466 U.S. at 687.

Turning first to whether counsel's performance was deficient, we note that the defendant must show that counsel's representation fell below an objective standard of reasonableness, considering all the circumstances. We recognize that our scrutiny of counsel's performance must be highly deferential, in view of the wide latitude counsel must have in making tactical decisions. We must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Strickland, 466 U.S. at 689.

With these standards in mind, we examine Laws' three claims.

1. Failure Adequately to Investigate Laws' Psychological Background.

Laws makes the argument, maintained throughout the state

court post-conviction proceedings, that his trial counsel failed adequately to investigate his past psychiatric treatment record and to explore a possible psychologically-based defense. In this regard, Laws claims that his psychiatric condition was heavily influenced by his service in Vietnam, and argues that his trial counsel was ineffective for failing to present mitigating evidence relating to his Vietnam experience and its effect on him.[10] Laws had undergone a psychiatric examination in the Mississippi State Hospital in 1974-75 while serving time in the Mississippi Penitentiary on an aggravated assault charge. Trial counsel, however, relied on a psychiatric examination of Laws conducted on September 22, 1981, at the Fulton State Hospital in connection with one of the two other capital murder charges which had been brought against Laws. This exam was much closer in time to the acts of murder and trials than the five-year old Mississippi exam. Further, the doctor at Fulton took into consideration the Mississippi exam. The Fulton State Hospital examination, which took into account Laws' prior Mississippi examination, concluded that Laws was mentally capable of standing

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[10] A prior opinion in this case is published at 834 F.2d 1401 (8th Cir. 1987). That opinion was vacated when the case was accepted for rehearing en banc. 845 F.2d 782 (8th Cir. 1988). We now reaffirm the result in the prior opinion, except with respect to part IV. B, pp. 1411-1415. The state had argued in the district court, and argues here, that failure to raise the "Vietnam experience" in mitigation during the collateral Rule 27.26 litigation in the Missouri state courts constituted procedural default, or no exhaustion.

The district court found no exhaustion bar: although conceding it was not raised, it was "part and parcel" of Laws' claim concerning mental health and family testimony. Our majority panel accepted the legal basis that the claim was before the state courts, but not the factual basis. The panel then concluded Laws had failed to establish Wainwright-Murray "cause" for the failure to raise his "Vietnam experience." Because of some arguable factual commonality interlacing these issues, and without disavowing the procedural bar issue, this being a death case, we prudentially decide to go directly to the merits aside from the procedural bar. See Strickland v. Washington, 466 U.S. 668 (1984).

trial, and that he was able to know and appreciate the nature, quality and wrongfulness of the murders when he committed them and had been capable of conforming his conduct to the requirements of the law. The record regarding this issue at the Rule 27.26 hearing is as follows:

> Q. What were the results of this examination that you were aware of before the trial?
>
> A. [Laws' trial counsel] The findings were, from Roman Numeral VIII, that the accused had no mental disease or defect within the meaning of Section 552.010, and that Leonard had the capacity to understand the proceedings against him and knew and appreciated the nature and wrongfulness of his conduct.
>
> Q. And do they also, on page four of this document, talk about an evaluation in Mississippi and what the diagnosis there was?
>
> * * * *
>
> A. It states that he was given the diagnosis of antisocial personality and situational reaction of adult life.
>
> Q. So the doctor in the examination you reviewed also considered this Mississippi evaluation, is that right?
>
> A. Yes.
>
> Q. Now, you said besides this examination in Defendant's Exhibit B, you also considered Leonard Laws, his background, and your conversations with him. And what did you glean from that, if anything?
>
> A. Well, in my conversations with him I didn't detect--again, its a lay opinion. But I didn't detect any mental disease or defect that would interfere with our preparing to go to trial, or for his standing trial.
>
> Q. All right. And so was that ever a plan, or a possible defense in your mind, a viable defense in any way to claim any mental disease or defect, based on your evaluation of this case?

> A. Well, I considered it, but I rejected it.[11]
>
> (Emphasis added.)
>
> Q. Did Leonard at any time ever insist that he should be evaluated, or that he was insane in any way?
>
> A. I don't recall that, no.
>
> [Rule 27.26 Tr. at 73-74.]
>
> * * * *
>
> Q. [D]id you read through that psychiatric report when you represented Mr. Laws?
>
> A. While I represented him, yes.
>
> Q. And in that report, do you recall the term "situational reaction," that Mr. Laws suffered from problems with situational reactions?
>
> A. Yes.
>
> Q. And did you speak to the psychiatrist who prepared that report about what a situational reaction was?
>
> A. No. I didn't.
>
> Q. And at this time, do you know what a situational reaction is?
>
> A. A situational reaction does not rise to the level of mental disease or defect. I know that.
>
> Q. But you did not investigate, at the time you represented Mr. Laws, exactly what a situational reaction was, what the scope of that was?
>
> A. What the scope of it was, I have an understanding what it is. But I don't know the actual scope of it. And again, I read it. It was in the context of the individual's finding that there was no mental disease or defect.
>
> (Emphasis added.)

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[11] Exhibit J to the petition demonstrates opening the door to extremely damaging cross-examination if the Mississippi psychiatric report had been before the jury: a highly explosive personality with non-existent remorse or guilt, pp. 2 & 4.

> Q. Right. But when you represented Mr. Laws and read this report, did you at any time talk to a psychiatrist or psychologist about what types of incidents aggravate situational reactions?
>
> A. No, I didn't.
>
> [Rule 27.26 Tr. at 83-84.]

The Rule 27.26 court, after hearing this testimony, found as fact that Laws:

> never gave any indication to his trial attorney or the trial court that he was mentally incompetent at the time of the trial herein or at the time of the offenses. In fact [Laws] had been examined on September 22, 1981, prior to the trial with respect to a third murder case against [Laws] in Washington County. The results of that examination show that [Laws] had no neurosis or psychosis.

The court then concluded that "[t]here was no indication or evidence which required a new mental examination of [Laws]. Mental examination conducted pursuant to Chapter 552, further shows that [Laws] had no significant mental problems."

In reviewing the Rule 27.26 transcript and findings and the conclusions of the Rule 27.26 court, the Missouri Court of Appeals found that "[c]lose examination of the transcript reveals that [trial counsel] made a reasoned strategic decision based on all the circumstances to refrain from putting on evidence at trial of [Laws'] psychiatric state." Laws v. State, 708 S.W.2d 182, 185 (Mo. App. 1986). The court concluded:

> The evidence at movant's 27.26 hearing convinces us that [trial counsel] made a careful and conscious choice against putting on psychiatric evidence during trial or at the penalty stage. Nothing made known to counsel during his representation of movant, and extensive interviews with him, suggested to counsel that presenting evidence of movant's psychiatric state would be of any benefit in his defense. Counsel had a duty to make reasonable investigations or to make a reasonable

> decision that makes a particular investigation unnecessary. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. at 2067. Counsel could have well reasoned that the jury would be more harsh with movant as a result of learning that his behavior could be erratic and violent. Contrary to movant's contention that counsel failed to ascertain the meaning and import of a "situational reaction," our review of the record leads to the conclusion that counsel was fully cognizant of the nature of this disorder and decided as a matter of sound trial strategy that it would not be helpful.
>
> [Counsel's] informed choice of trial strategy to refrain from presenting psychiatric evidence at trial or during the penalty stage rendered it unnecessary to engage in further inquiry into movant's psychiatric state.

Id. at 186.

The district court found, however, that trial counsel's decision not to present psychiatric evidence "was not based on a reasonably thorough investigation into [Laws'] character and background or into other information potentially relevant to mitigating circumstances. The record does not reflect counsel's investigation of [Laws'] military or psychiatric background for purposes of the punishment phase of the trial." Mem. Op. at 22.

We believe, however, that the record reveals that counsel acted well within the bounds of professional competency. The state court findings of fact were entitled to a presumption of correctness pursuant to 28 U.S.C. § 2254(d). We accept the state courts' legal conclusion of effectiveness based on those facts.

Counsel could easily have concluded that the decision to present psychological testimony would have disastrous consequences. Skillful cross-examination could have revealed that although Laws suffered from no mental impairment that would negate responsibility for the murders he had committed, he was nonetheless a maladjusted man with a propensity for violence. In view of the fact that Laws' psychological history revealed to

counsel that he had no mental disease or defect, as well as the fact that in their interviews, Laws appeared normal and made no mention of any psychological impairment, for counsel to have nonetheless raised the issue of Laws' mental state at trial could have induced cross-examination which would make counsel appear devious or unprepared. Such cross-examination could have alienated the jury against his client.

The record further reveals that counsel was well aware of Laws' Vietnam service. In an affidavit prepared in support of his federal habeas petition, Laws stated: "During my trial preparation for the Williams case, [trial counsel] and I discussed very briefly my service in the army and in Vietnam from 1967 to 1970. I told him I had an honorable discharge. He never asked me about it again." During his closing argument in the punishment phase of Laws' trial, Laws' counsel mentioned that Laws had spent time in Vietnam: "when I was in Vietnam, I killed somebody. Okay, I killed somebody. I had to. Leonard Laws was in Vietnam. I killed somebody in those circumstances and I can remember the day, March 17th." Tr. Vol. II at 808.

We also note that the Missouri trial judge who sentenced Laws was aware that Laws had been in Vietnam. The trial judge had before him the report of the presentence investigation on Laws, which revealed that Laws had spent time in Vietnam and had been honorably discharged from the United States Army. The sentencing judge was therefore able to take into account Laws' Vietnam experience when rendering his decision.

Although counsel was cognizant of Laws' time spent in Vietnam, it was nonetheless reasonable for him to forego presentation of this issue. Laws argues that testimony could have been elicited, as a result of psychological tests and family interviews, as to the effect of Vietnam upon his mental state, including facts about his personality before and after his

military service. Introduction of the facts, however, would have opened the door to cross-examination as to whether Laws' disturbed mental state resulted not from his time in Vietnam but from his more than six years in prison. In sum, family members claimed testimony would be essentially limited to the fact that he had changed after Vietnam. Laws also argues that mitigating evidence could have been presented concerning his service record, including facts about his combat experience, his citations received for duty, and his good discharge record. As the State points out, however, to introduce evidence of Laws' record in Vietnam would have opened the door to cross-examination revealing prejudicial facts about Laws' drug usage while in the service, an auto theft charge, an AWOL conviction, and the lack of substantiation of his claimed war injury.

In sum, we conclude that under Strickland, counsel conducted an adequate investigation into a possible psychologically-related defense. In view of the fact that the clinical evidence did not support a conclusion that Laws had a mental disease or defect, there was no reason for counsel to investigate further into Laws' psychological background. Moreover, it was not unreasonable for counsel to conclude that the potential risks of a defense based on Laws' Vietnam experience outweighed the potential benefits. Counsel's performance in this regard cannot be considered deficient.

2. Failure to Contact and Interview Relatives.

Laws argues that his counsel erred in failing adequately to pursue an investigation of relatives who would be willing to testify on Laws' behalf. Again, this argument is contradicted by the facts established in the Rule 27.26 hearing. The hearing transcript reveals the following:

> Q. Now, other than George Gilmore, did Leonard Laws also request that you call some members of his family to testify, at least to the death penalty phase of that, if it came to that?

A. [Laws' trial counsel] Yes, he did. He gave me a phone number of an individual which was either his father's trailer or his stepmother's trailer. I am not sure which. And it was in rural Missouri. I am not sure where it was. And I called numerous times.

Q. Did you get ahold of anyone?

A. I finally did, yes. I finally got ahold of the woman. And I don't recall her name right now, I'm sorry. But the woman who Leonard gave me her phone number. And it was late at night one night when I happened to catch her. And I explained to her that we wished her to testify perhaps in the death phase of the case.

Q. What was her response?

A. She refused.

(Emphasis added.)

Q. Did she give you any reason why she or Leonard Laws' family might be upset with him and why they wouldn't want to testify?

A. She stated that she didn't wish to help Leonard in this case, and she didn't--she knew that the other family members didn't wish to help. I believe I spoke with one of his brothers, too. I am not sure of that. I just saw that that was amended today, and I didn't have an opportunity to look over my records. But I believe I spoke with one of his brothers.

(Emphasis added.)

Q. But in any case, you made some efforts, but you couldn't get any of them to testify?

A. In the death phase, they were most adamant about not testifying.

(Emphasis added.)

Q. But you pursued that as being a possible advantage to have?

A. In any death case, you wish to have someone, a relative to testify, to show that he has people who care enough to come in and testify.

[Rule 27.26 Tr. at 77-78.]

The Rule 27.26 court found as fact that trial counsel "contacted relatives of [Laws] by calling a phone number [Laws] supplied. Two different persons told [trial counsel] that the relatives would not testify on Leonard Laws's behalf." The court concluded that there was no deficiency on this ground, and the Missouri Court of Appeals agreed:

> After multiple attempts to obtain relatives to testify for movant at the penalty hearing [counsel] was able to contact a woman he believed to be movant's step-mother and a brother. Both persons stated unequivocably that they would not testify at the penalty hearing and that other relatives would also not testify. [Laws] himself testified that he personally wrote his brothers and father requesting them to testify on his behalf, but they failed to appear for trial. Furthermore, [Laws] did not present family members as witnesses at the evidentiary hearing. Under the circumstances, we find that counsel engaged in an adequate investigation of movant's relatives, and that no favorable information appeared as a result. * * * Counsel was well aware of the helpfulness of favorable testimony by relatives during the penalty stage, as the record discloses, but unfortunately was faced with a situation where reasonable efforts revealed that movant's relatives were strongly opposed to testifying. The decision not to call them as witnesses was thus a matter of trial strategy.

Laws, 708 S.W.2d at 187.

Again, we find the state courts' conclusions compelling.[12] The district court, however, concluded that the record did not "reflect a responsible effort to glean available relatives' own knowledge of and relationship to petitioner." Mem. Op. at 22.

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[12]Moreover, Laws' counsel testified at the Rule 27.26 hearing that Laws himself had written letters seeking aid in his defense to his father and brothers, to no avail. Although these additional efforts to get relative testimony took place, they were not reflected in later affidavits (exhibits B, D, E, F, G, and H) submitted by relatives, for the questions to the affiants were expressly confined to whether they had heard from Laws' counsel, not whether they had heard from Laws himself.

We disagree with the district court's conclusion. We think that counsel's efforts in this regard were objectively reasonable.

Trial counsel could have reasonably determined that calling Laws' relatives to the stand, after what they had told him of their feelings for Laws, would have been destructive to Laws' defense. In view of the relatives' adamant refusal to testify favorably on Laws' behalf, cross-examination would not even have been necessary in order to hurt Laws' case. The simplest questions asked on direct examination would have revealed the relatives' total lack of support for Laws. As a result, the jury more likely than not would have developed animosity toward Laws and would have distrusted and disrespected counsel's efforts. Counsel's decisions were within the wide range of professionally competent assistance approved by Strickland.

3. Failure to Elicit Testimony of Community Members.

Laws argues that his trial counsel was derelict in failing to call to the stand, or consider calling to the stand, a clergyman, statistician or professor to testify against the death penalty. The State first responds that this claim of error is subject to an adequate and independent state procedural bar precluding review by this court, because Laws failed to present this claim on appeal in the state courts. Laws presented the claim in his amended Rule 27.26 motion, but the Missouri trial court held it to be without merit. Laws, however, when appealing from the denial of Rule 27.26 relief, did not brief this allegation of error as a ground for appeal. We nonetheless conclude that this claim is properly before us for the following reasons. Laws filed a pleading with the Missouri Court of Appeals entitled "Appellant's Issues Expected To Be Raised On Appeal," which stated that "The trial court erred in failing to grant appellant's 27.26 motion for failure to investigate and prepare defense witnesses for the penalty stage." Laws argues, and we

accept, that trial counsel's failure to elicit testimony from a clergyman, statistician or scholar was included in this general assignment of error. This pleading provided notice to the court of appeals that Laws sought review of this particular point. Furthermore, the court of appeals reviewed the findings of fact and conclusions of law with regard to this point in accordance with Missouri Supreme Court Rule 27.26(j). The court stated in relevant part:

> On appeal, movant raises two points of error. First, movant contends that the trial court failed to make specific findings of fact and conclusions of law regarding his claim of ineffective assistance of counsel based on defense counsel's decision to refrain from putting on evidence during the penalty stage in mitigation of the death penalty.
>
> * * * *
>
> Movant presented the testimony of several witnesses, including his trial counsel, concerning the advisability of putting relatives and clergymen on the stand during the penalty stage of a capital murder trial to testify in mitigation of the death penalty. This testimony was received without objection by the state. Under the circumstances, we find that the issue was tried by the implied consent of the parties, and thus, will be treated as amending the Rule 27.26 motion to conform to the evidence.

Laws v. State, 708 S.W.2d at 184. (Emphasis added.)

Therefore, Laws did not waive his right to raise the failure of trial counsel to elicit testimony from a clergyman, statistician or professor in support of his ineffective assistance of counsel claim. In addition, the issue has been exhausted at the state level. "The exhaustion doctrine requires only that the state courts have one full and fair opportunity to decide a question which is properly presented to it." Mucie v. Missouri State Department of Corrections, 543 F.2d 633, 636 (8th Cir. 1976), citing Picard v. Connor, 404 U.S. 270 (1971). Since the Missouri Court of Appeals ruled adversely to Laws on this point and the Missouri Supreme Court denied a motion for rehearing and/or

transfer, Laws state remedies as to this point have been exhausted, and it is properly before this court.

At the Rule 27.26 hearing, the following colloquy occurred as to this issue:

> Q. Did you ever consider putting on any type of priest or some religious personage to testify?
>
> A. [Laws' trial counsel] Yes, I considered that. We had used that, two individuals of that ilk in the first trial [for the murder of Woodrow Wilson Elliott] to testify in the death phase.
>
> Q. And what about the second trial? Why was that not--did that not come to pass?
>
> A. After the first trial I spoke with the jurors in the case. And they told me that they had disregarded totally the testimony of these individuals. I believe the gentleman's name is Mr. Gilsonin.
>
> Q. He was a statistician, or professor?
>
> A. And I don't recall the other. I don't recall the other gentleman's name right now.
>
> Q. But the one was a priest and one was a statistician?
>
> A. Right. And the jurors said that they rejected out of hand that testimony and instead centered on the deal between Norman Gilmore and the State in their finding of fifty years rather than death in the first case.
>
> Q. And so that influenced you as far as your trial strategy in the second case?
>
> A. It did. And the fact that the facts in the second case were much different than the facts in the first case.
>
> Q. You mean as far as who the actual killer was?
>
> A. Right.
>
> [Rule 27.26 Tr. at 78-79.]

In considering this testimony, the Rule 27.26 court made the following factual findings:

> [Trial counsel] was fully informed at the time of trial of the possibility of calling clergy persons and professors to give their views on the death penalty. [Counsel] decided after due consideration and after calling such persons in the first trial of Leonard Laws that their testimony would not be beneficial to the case.

The court concluded in this regard: "Failure to call witnesses * * * was an appropriate trial strategy."

The district court noted that this issue was not as significant as the others, in part because the district court recognized that counsel had used two "community members" at Laws' prior criminal trial and thus had the opportunity to weigh their credibility and presentation in deciding whether or not to use them again. The district court also noted that the Missouri Supreme Court had recently found such testimony irrelevant. State v. Gilmore, 681 S.W.2d 934, 941 (Mo. banc 1984). The district court concluded, however, that "a discussion with one of twelve jurors as to why the jury reached its decision seems an insufficient basis for a tactical decision in a trial before a different jury--particularly where the consequence of the decision may be fatal." Mem. Op. at 23 n.2.

We note that the record reflects that counsel spoke with more than one of the prior jurors. In any event, we believe that talking to jurors regarding the success of a strategy suggests not deficient representation but keen lawyering. Trial counsel was far better able to evaluate the potential impact of community member testimony after having seen how successful it had been than if he had made the decision to use or reject such testimony in a vacuum.

Counsel's choice was solidly grounded in practical concerns and experience. A trial lawyer does not try each new case with his mind a blank slate; rather, he brings to the case the sum of his knowledge and experience gained through previous trials. This is what distinguishes the veteran litigator from the recent law school graduate. Laws' trial counsel had previously defended Laws for the Elliott murder, see supra note 1, and he took the opportunity to find out what had been effective and what had not. He was told directly that the jurors had put no credence in the testimony of community members. Relying on this information and his practical experience in the previous case, counsel made the reasonable decision not to present what he considered to be useless testimony in this case.

Counsel had pursued substantially the same strategy during the punishment phase of the Elliott trial as he used here. In the Elliott trial, the strategy was successful, because Laws received a life sentence rather than the death penalty. Laws had no complaint with counsel's strategy at the Elliott trial. Counsel then used the essential ingredients of his previously successful strategy in this trial, while refining the strategy to omit the testimony of community members based on the lessons learned from the prior trial. In short, for counsel to repeat a winning strategy in a later trial for the same type of crime, involving the same defendant, strikes us as eminently reasonable.

Accordingly, we hold that trial counsel's choice not to present the testimony of community members was intelligent, tactically sound trial strategy. Laws' claim on this ground thus fails the first Strickland prong, which requires that counsel's performance be shown deficient.

V. CONCLUSION.

In examining counsel's performance, we do not use 20-20 hindsight. As this court stated in Blackmon v. White, 825 F.2d 1263 (8th Cir. 1987):

> [T]he courts must resist the temptation to second-guess a lawyer's trial strategy; the lawyer makes choices based on the law as it appears at the time, the facts as disclosed in the proceedings to that point, and his best judgment as to the attitudes and sympathies of judge and jury. The fact that the choice made later proves to have been unsound does not require a finding of ineffectiveness. The petitioner bears the burden of successfully challenging particular acts and omissions of his attorney which were not the result of reasonable professional judgment; it is not enough to complain after the fact that he lost, when in fact the strategy at trial may have been reasonable in the face of an unfavorable case.

Blackmon, 825 F.2d at 1265 (Emphasis added.)

We believe that counsel's strategy was indeed reasonable in the face of this highly unfavorable case. Accordingly, Laws has failed to show that his trial counsel's performance deprived him of his sixth amendment right to effective assistance of counsel.

For the foregoing reasons, the judgment of the district court is reversed.

McMILLIAN, Circuit Judge, dissenting, with whom LAY, Chief Judge, and HEANEY and ARNOLD, Circuit Judges, join.

I respectfully dissent. I would affirm the district court's judgment granting the writ of habeas corpus because appellant did not receive effective assistance of counsel at the penalty phase of his trial. Laws v. Armontrout, No. 86-2214C (3), Slip op. at 23 (E.D. Mo. Dec. 15, 1986) (memorandum opinion). I would therefore remand the case to the state court for a new trial on the penalty phase only.

This is a death penalty case. It is readily acknowledged that "the representation of a person charged with a capital offense imposes the heaviest professional responsibility known to the practice of law." Johnson v. Cabana, 818 F.2d 333, 340 (5th Cir. 1987). Yet appellant's counsel failed to conduct a reasonable investigation into appellant's background--an investigation that would have led to admissible mitigating evidence at the penalty phase.

After an extended hearing, an experienced district court judge found that counsel's representation fell far below the standard of reasonableness and prejudiced appellant. Specifically, the district court found that counsel (1) failed to investigate and present evidence about appellant's military background and the psychological effect his service in Vietnam had had on him, (2) failed to make reasonable efforts to contact appellant's family members and to present relevant evidence from them, (3) failed to investigate and present evidence of appellant's prior psychological evaluation, and (4) failed to present any evidence as to the inappropriateness of the death penalty. Relying on its finding and applying the standards set forth in Strickland v. Washington, 466 U.S. 669, 686 (1984) (Strickland), the district court concluded that there was a reasonable probability that, but for counsel's ineffective representation, the result of the proceedings would have been different. Id. at 23. I agree.

In Strickland the Supreme Court articulated the following standard for determining whether assistance of counsel has been ineffective: "the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." 466 U.S. at 686.

To succeed on a claim of ineffective assistance of counsel, a convicted defendant must show both that the counsel's perform-

ance was deficient and that the deficient performance prejudiced the defendant. Id. at 687. This is the same test used by the Eighth Circuit Court of Appeals in cases decided before Strickland. See Pickens v. Lockhart, 714 F.2d 1455, 1460 (8th Cir. 1983). The test of deficient performance is one of reasonableness. We do not deal in absolutes, but rather test counsel's performance by looking to "the skill and diligence that a reasonably competent attorney would exercise under similar circumstances." Thomas v. Lockhart, 738 F.2d 304, 307 (8th Cir. 1984). Likewise, the test for prejudice is not absolute.

Strickland defines "prejudice" as "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." 466 U.S. at 694.

The majority faults the district court for relying on the wrong legal test--the outcome determinative test. This assessment of the district court's analysis is wrong for two reasons. First, the district court clearly recognized and relied on the Strickland test. Slip. op. at 20. Second, the district court found "that the outcome of the punishment phase of the case would have been different absent counsel's failure to investigate fully and to present mitigating evidence." Id. at 23. Thus, the district court concluded that appellant's evidence met an even more stringent test than that required by Strickland.

Strickland recognized that the outcome determinative test places a heavier burden on an appellant than the test it articulated: "with regard to the prejudice inquiry, . . . the strict outcome determinative test . . . imposes a heavier burden on defendants than the tests laid down today." 466 U.S. at 697. Therefore, because appellant's evidence met the outcome determinative test as the majority acknowledges, the evidence

surely met the lesser Strickland test of "probability sufficient to undermine confidence in the outcome." Id. at 694.

The majority believes that the district court wrongly established a per se rule that defense counsel is ineffective whenever a defendant receives the death penalty after counsel offers no evidence in mitigation. However, the majority misreads the opinion of the district court. In fact, the district court specifically recognized that its opinion might be so construed and specifically rejected this approach:

> To a certain extent, we risk developing a body of law that says that at the death penalty phase defense counsel must introduce some evidence or be found ineffective, while it is certainly possible and sometimes probable that putting on and offering evidence may worsen the client's chances. Perhaps this ruling stresses only the importance of fully investigating each case on its merits before deciding that as a matter of reasonable strategy, no evidence should be introduced.

Slip. op. at 25. (emphasis added).

Where the defendant's life may be the penalty exacted by the state, I do not believe we ask too much of defense counsel that he or she first undertake a reasonable investigation so that he or she can make and put before the court the best defense available to the defendant. Strickland specifically recognized that:

> [c]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances. . . .

466 U.S. at 691 (emphasis added). The Supreme Court, in taking counsel to task for inadequate preparation, said:

> [A] complete lack of pretrial preparation puts at risk both defendant's right to an "ample opportunity to meet the case of the prosecution" and the reliability of the adversarial testing process.

Kimmelman v. Morrison, 477 U.S. 365, 385 (1986) (citations omitted).

Applying the standards and holdings of Strickland and Kimmelman to the present case, it is clear that appellant received ineffective assistance of counsel and was prejudiced thereby. The duty to advocate the defendant's cause, including consulting with the defendant and bringing to bear such knowledge as will render the trial a reasonable adversarial process, Strickland, 466 U.S. at 668, mandates that defense counsel investigate and develop facts about the defendant's background in an attempt to develop mitigating evidence. Once counsel has completed such an investigation, then, and only then, would he or she be in a position to reasonably decide whether or not to present the evidence as a matter of trial strategy.

In the present case, trial counsel had a telephone conversation with someone claiming to be appellant's stepmother; he states that this person indicated that none of appellant's relatives wished to testify for appellant. Counsel also had a conversation with Laws' brother, whom he never even asked to testify. Based on these two sketchy conversations, counsel failed to contact other family members and failed to develop mitigating evidence he could have used at the penalty phase of Laws' trial.

The majority relies primarily on the presumption of correctness to be accorded a state court's finding of fact as the basis for its decision. While I do not dispute this proposition as a

general legal proposition, the presumpti . of correctness does not apply to the state court's determination of the effectiveness of counsel. In Sumner v. Mata, 455 U.S. 591, 597 (1982), the Supreme Court held that the presumption of correctness accorded the factual findings of the state court under 28 U.S.C. § 2254(d) applies only to historical facts underlying counsel's performance but not to the ultimate conclusion whether effective assistance has been rendered. This latter conclusion is not a finding of fact binding on a federal court because, by its very nature, the issue of effective assistance is a mixed question of law and fact. Thomas v. Lockhart, 738 F.2d at 307.

Thus, the district court had the duty to carefully examine the conclusion of the state court and to make "every effort . . . to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct and to evaluate the conduct from counsel's perspective at the time." Id. at 309 (citations omitted); see Kellogg v. Scurr, 741 F.2d 1099, 1101 (8th Cir. 1984). Moreover, defense counsel may not immunize his or her performance from sixth amendment scrutiny merely by labeling acts or omissions as trial strategy. Kellogg v. Scurr, 741 F.2d at 1102.

I do not take issue with the state court's determination of historical facts. I accept for purposes of this analysis that defense counsel in fact did what he testified he did: he reviewed the 1981 psychiatric examination but did not consider the 1974 psychiatric examination and did not speak to the psychiatrist to determine the significance of appellant's diagnosis; he spoke to a woman he believed to be appellant's stepmother and may have spoken to appellant's brother but could not remember their names; and he talked to one (or perhaps two) jurors to determine whether the testimony of members of the community on behalf of appellant was effective.

It is these facts admitted by counsel (and accepted by the state court) that the district court properly subjected to an independent evaluation to determine if there was effective assistance of counsel. It is this independent evaluation which the majority wrongly rejected. The majority incorrectly applies the presumption of correctness not only to the historical facts found by the state court, but also to the state court's conclusion that effective assistance was provided. See Sumner v. Mata, 455 U.S. at 597; Kellogg v. Scurr, 741 F.2d at 1102.

The majority begins its analysis with a recital of the many past accomplishments of defense counsel. However, the focus of inquiry concerning counsel's possible ineffectiveness must be "the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690. For that reason, it is appropriate to judge counsel's effectiveness by looking solely to what he knew in this case and what he failed to find out because of his failure to investigate.

The majority credits defense counsel with being "well aware of Laws' Vietnam service." Laws had told counsel that he had served in Vietnam from 1968-1970 and that he had been honorably discharged. During closing argument, defense counsel even acknowledged that he himself had been in Vietnam. Far from excusing counsel's failure to further investigate, however, this knowledge makes his inaction all the more reprehensible.

Much has been written about the severe emotional impact suffered by some of the soldiers who fought for this country during the Vietnam Era. Congress has recognized the socialization and adjustment problems of Vietnam veterans by passing the Veterans Health Care Amendments Act in 1979. 38 U.S.C. § 612 et seq. This act authorizes the Veterans Administration to provide services to Vietnam Veterans suffering from post-traumatic stress

disorder after their return to civilian life. The legislative history of this act states:

> According to testimony from psychiatrists and other physicians, psychologists, social workers, and counselors at hearings held in February 1976, June 1977, and January 1979, veterans of the Vietnam era have suffered significantly as the result of society's indifference and, in some cases, overt hostility to the sacrifices they made during their periods of military service. Those who served in Vietnam have also experienced anguish due to the unusual conditions of service in Vietnam - including the inability to differentiate between ally and enemy, the increased tension due to guerilla warfare, and the fact that, because service personnel often went to or returned from Vietnam singly rather than as part of entire combat units, they often lacked the mutual psychological support of long-known comrades during the critical periods of entering and leaving the conflict. Large numbers of returning Vietnam veterans have experienced guilt, bewilderment, alienation, pessimism, tension, restlessness, and other symptoms of low-grade readjustment problems. These problems frequently result in family difficulties, unemployment, alcohol or drug dependence or abuse, arrest records, and other forms of social and economic dislocation.

96th Congress, First Session, 1979 U.S. Code. Cong. & Admin. News 181-82. Given the overwhelming and well-known evidence of psychological problems among Vietnam veterans, it was unreasonable for counsel not to investigate Laws' military experience to see if any evidence of mitigating circumstances could be developed.

Had he investigated, counsel would have learned that Laws had earned the National Defense Service Medal, the Vietnam Service Medal, the Vietnam Campaign Medal and the Good Conduct Medal. Had he investigated, counsel would have learned that Laws' father, two sisters, and brother would have testified that Laws was a normal young man before his entry into the Army at age

17. Counsel would have learned that Laws had undergone a drastic personality change after the time he spent in Vietnam. He would have learned that Laws changed from a church-going young man who had never had any trouble with the law to a nervous and withdrawn loner constantly in trouble, in and out of prison. But counsel did not learn anything about Laws' background because he unreasonably relied upon the statement of one woman, who he thought might be Laws' stepmother, that no members of Laws' family would be willing to testify.

Counsel failed to investigate and discover the records of Laws' psychiatric treatment in the Mississippi State Hospital in 1974 and 1975. Had he done so, counsel would have learned even more evidence of appellant's personality change after his military service in Vietnam.

Granted, defense counsel put much store in his belief that the jury would never impose the death penalty because appellant was not the person who fired the gun, and therefore, he reasoned, did not deserve to die. Such a belief was totally unwarranted given the gruesome and calculated nature of the murders with which appellant was charged and his two prior capital murder convictions. To disregard the reality and seriousness of the situation was unreasonable and too risky to be condoned. His conduct was contrary to professional norms. It also evidenced a complete lack of pretrial preparation and put at risk appellant's right to offer evidence of mitigating circumstances. Given the totality of the circumstances in this case, counsel's representation of Laws was defective enough to undermine the reliability of the adversarial process. See Kimmelman, 477 U.S. at 386.

In the present case, the district court did not set Laws' conviction aside; the district court only ordered that the case be remanded for a new penalty hearing. Thus, even if we were to affirm the decision of the district court, appellant would not go

free because defense counsel blundered. Our only effect would be to grant appellant a new penalty hearing--one which would be in accord with our notion of the fair treatment that should be necessary before the state can take a person's life. I would affirm the decision of the district court.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 87-1018

Leonard Marvin Laws,

Appellee,

v.

Bill Armontrout,

Appellant.

Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: April 14, 1987

Filed: December 9, 1987

Before McMILLIAN, FAGG and MAGILL, Circuit Judges.

MAGILL, Circuit Judge.

The State of Missouri appeals from the district court's grant of habeas corpus relief to Laws. The district court vacated Laws' death sentence after concluding that Laws had received ineffective assistance of counsel during the punishment phase of his trial. We reverse and reinstate the sentence, finding no valid claim of ineffectiveness of trial counsel.

I. BACKGROUND.

In October of 1980, Leonard Laws was living in a two-room house trailer with George Clifton Gilmore, Gilmore's brother

Norman, and several others in the Gilmore family. All three men were unemployed. George Gilmore suggested to his brother and Laws that they could make money easily by robbing old people and then killing them to prevent identification. The three bought shotguns and a rifle on October 8, 1980. In the early morning of October 29, 1980, they went to the home of Clarence and Lottie Williams, whom the Gilmores had known through an uncle. Mr. Williams was eighty-three years old and his wife was eighty-one. The assailants gained entry to the Williams' home after Laws cut the telephone line, then they tied Mr. and Mrs. Williams up in chairs. Laws threatened to cut off their fingers if they would not reveal where their money was concealed. They complied, and the three ransacked the house. Mr. and Mrs. Williams were then untied and taken into the bedroom. George Gilmore prepared to kill them with his twelve-gauge shotgun, and Laws suggested instead: "Let me hit them in the head with a ball bat." Gilmore, however, told Laws to go stand outside and see if he could hear the shotgun blasts, and Laws complied. Gilmore then shot Mrs. Williams, reloaded the weapon, then shot Mr. Williams. The first shot failed to kill Mr. Williams, and he tried to run toward the front door, so Gilmore shot him a second time, killing him. Laws then reentered the house. After removing property, the three poured fuel oil on the floor, which Laws lit, starting a fire which substantially destroyed the house.

II. PRIOR PROCEEDINGS.

Laws received a four-day trial in St. Louis County, Missouri Circuit Court in July of 1982. A jury found him guilty of two counts of capital murder. The punishment phase of the case began on the morning of July 23, 1982, before the same jury. During this phase the State introduced evidence, through certified copies of judgments, that Laws had been convicted of two previous

but separate capital murders in Missouri,[1] for which he received life sentences, two armed robberies in Arizona, for which he received concurrent five to six-year sentences, and one aggravated assault in Mississippi, for which he received an eleven-year sentence. Laws was imprisoned in March of 1982 in the Missouri State Penitentiary for his first Missouri murder conviction, and he has been incarcerated ever since. Laws had previously spent a little over six years in prison on the armed robbery and aggravated assault convictions before being paroled. Laws' lawyer, although arguing on his behalf, introduced no evidence of mitigating circumstances.[2] The trial

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[1] See State v. Laws, 668 S.W.2d 234 (Mo. App. 1984); State v. Laws, 699 S.W.2d 102 (Mo. App. 1985). In the first case, Laws and the Gilmore brothers decided to rob Woodrow Wilson Elliott on the night of October 7, 1980. Elliott was an old man who lived alone and had no legs and only one arm. The trio drove to Mr. Elliott's house and when he answered the door, Laws kicked him, jumped on him, and choked him into unconsciousness. They then ransacked the house, during which time Laws stabbed Mr. Elliott in the back of the head. Before leaving with their loot, they set fire to Mr. Elliott's home. The three might not have been arrested if Laws had not demonstrated to Gilmore's relatives "how he had stabbed Mr. Elliott, and laughing, said words to the effect that Elliott had had such a hard head that it bent his knife." Laws, 668 S.W.2d at 237. In the second case, the evidence showed that in the early morning of December 29, 1980, Laws broke into a shed belonging to Mrs. Elizabeth Roderique. He took a gasoline can from the shed into Mrs. Roderique's home, carried the gasoline into her bedroom, and set her house on fire. Mrs. Roderique's body was found on the remains of her bed, but the body was so badly charred and burned that the cause of death could not be determined by autopsy. Laws, however, admitted that he had killed her. Laws, 699 S.W.2d at 103-04.

[2] In capital murder cases, Missouri law directs the judge to consider, or to include in his instructions to the jury for it to consider, circumstances relevant to the crime which tend to aggravate or mitigate its severity. Mo. Rev. Stat. § 565.012 (1982) provides a list of aggravating and mitigating circumstances and also directs consideration of any aggravating or mitigating circumstances otherwise authorized by law. The statute further provides that the death penalty shall not be imposed unless at least one of the listed statutory aggravating circumstances is found. § 565.012.5. In this case the jury

court nonetheless gave the jury an instruction which directed it to consider any mitigating circumstances.[3] The jury returned a

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found the following four statutory aggravating circumstances were present:

> (1) "The defendant has a substantial history of serious assaultive convictions." (§ 565.012.2(1)).
>
> (2) "The murder of each victim was committed while the defendant was engaged in the commission of capital murder of the other victim." (§ 565.012.2(2)).
>
> (3) "The defendant murdered Lottie and Clarence Williams for the purpose of receiving money or any other thing of monetary value." (§ 565.012.2(4)).
>
> (4) "The murders of Lottie and Clarence Williams involved depravity of mind and that as a result thereof it was outrageously wanton and horrible." (§ 565.012.2(7)).

Tr. Vol. II at 813-14.

On appeal the Missouri Supreme Court did not decide whether the last circumstance was supported by the evidence, because it found that the first three were soundly established by the evidence. State v. Laws, 661 S.W.2d 526, 532 (Mo. banc 1983), cert. denied, 467 U.S. 1210 (1984).

[3]The instruction, Instruction No. 30, read as follows:

> If you decide that a sufficient aggravating circumstance or circumstances exist to warrant the imposition of death, as submitted in Instruction No. 28, it will then become your duty to determine whether a sufficient mitigating circumstance or circumstances exist which outweigh such aggravating circumstance or circumstances so found to exist. In deciding that question you may consider all of the evidence relating to the murders of Clarence and Lottie Williams.
>
> You may also consider
>
> 1. Whether the defendant was an accomplice in the murder of Clarence or Lottie Williams and whether his participation was relatively minor.
>
> 2. Whether the defendant acted under extreme duress or substantial domination of another person.

verdict fixing Laws' punishment at death. Laws' motion for a new trial was overruled on September 17, 1982, and he was sentenced to death on each count of capital murder. Laws appealed, represented by new counsel, but the conviction and sentence were affirmed in full. State v. Laws, 661 S.W.2d 526 (Mo. banc 1983), cert. denied, 467 U.S. 1210 (1984). Rehearing was denied on December 20, 1983. Laws then filed a pro se motion pursuant to Mo. S.Ct. R. 27.26, alleging ineffective assistance of counsel.[4] New counsel was appointed for him, and on November 16,

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> You may also consider any circumstances which you find from the evidence in extenuation or mitigation of punishment.
>
> If you unanimously decide that a sufficient mitigating circumstance or circumstances exist which outweigh the aggravating circumstance or circumstances found by you to exist, then you must return a verdict fixing defendant's punishment at imprisonment for life by the Division of Corrections without eligibility for probation or parole until he has served a minimum of fifty years of his sentence.

[4]At the time Laws filed his motion, Missouri Supreme Court Rule 27.26 provided in pertinent part:

> A prisoner in custody under sentence and claiming a right to be released on the ground that such sentence was imposed in violation of the Constitution and laws of this State or the United States, or that the court imposing such sentence was without jurisdiction to do so, or that such sentence was in excess of the maximum sentence authorized by law or is otherwise subject to collateral attack, may file a motion at any time in the court which imposed such sentence to vacate, set aside or correct the same. Unless the motion and the files and records of the case show to the satisfaction of the court that the prisoner is entitled to no relief, the court shall cause notice thereof to be served on the prosecuting attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction or that the sentence imposed was illegal or otherwise subject to collateral attack, or that there was such a denial or infringement of the constitutional

1984, an evidentiary hearing was held on the Rule 27.26 motion before a different judge from the one presiding over Laws' trial. The court found no showing of incompetence by Laws' trial counsel, and Laws appealed. The Missouri Court of Appeals affirmed the denial of relief. Laws v. State, 708 S.W.2d 182 (Mo. App. 1986). Laws' motions for rehearing and for transfer were denied on March 25, 1986 and May 13, 1986. He then unsuccessfully petitioned to the Supreme Court for certiorari. Laws v. State, 107 S.Ct. 246 (1986).

Thus, after eight unsuccessful attempts in the state court system, four of them alleging ineffective assistance of counsel, Laws began the federal attack upon his sentence, filing a pro se petition for writ of habeas corpus in the district court pursuant to 28 U.S.C. § 2254. Counsel was appointed for him, and in his amended petition he raised two arguments. He first argued that he was denied effective assistance of trial counsel in violation of the sixth and fourteenth amendments, when his court-appointed attorney failed totally to put on any evidence in mitigation during the punishment phase of his trial.[5] In support of this contention he argued that the following mitigating evidence should have been investigated and presented: First, Laws' honorable service record in Vietnam; and second, hospital psychiatric records and family testimony, showing how his psyche had been changed by his time serving in Vietnam. Laws also

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rights of the prisoner as to render the judgment subject to collateral attack, the court shall vacate and set aside the judgment and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

[5]To avoid potential confusion, we note that although Laws had a total of four separate counsel representing him on his various motions and appeals, his only claim of ineffectiveness of counsel is against his Missouri trial attorney, and alleges ineffective assistance only during the penalty phase, not the guilt phase, of his trial.

argued that the imposition of the death penalty violated his eighth and fourteenth amendment rights in that Laws was only an accomplice and had no direct role in the killing of the victims. Laws sought only a new trial of the death penalty phase, and did not raise issues regarding his counsel's handling of the guilt phase of his trial. In an unpublished memorandum opinion, the district court granted Laws' habeas corpus petition and vacated his two consecutive death sentences, giving the State the opportunity to retry the punishment phase of the case.[6]

III. STANDARD OF REVIEW.

In considering an appeal from the granting of habeas corpus relief on the ground of ineffective assistance of counsel, this court may engage its own independent review of the district court's conclusion, because the issue of ineffective assistance of counsel presents a mixed question of law and fact. Martin v. McCotter, 796 F.2d 813, 817 (5th Cir. 1986), cert denied, 107 S.Ct. 935 (1987); Reiger v. Christensen, 789 F.2d 1425, 1427 (9th Cir. 1986). If a state court has rendered specific predicate factual findings, those findings should be presumed correct unless certain conditions exist which cast those findings into doubt. 28 U.S.C. § 2254(d); Sumner v. Mata, 449 U.S. 539 (1981); Martin, 796 F.2d at 817. The district court's findings of fact,

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[6]The district court based its decision on Laws' ineffectiveness claim and declined to reach his eighth amendment claim, which argued essentially that because he was not the triggerman, the death penalty was inappropriate. Laws' eighth amendment claim is not before us on appeal. We note nevertheless that the Supreme Court's recent decision in Tison v. Arizona, 107 S. Ct. 1676 (1987), is dispositive of this issue. In Tison the Supreme Court held that the eighth amendment does not prohibit the death penalty as disproportionate in the case of a defendant who, even though he neither intends to kill the victims nor inflicts the fatal wounds, nonetheless shows major participation in the felony which results in murder and has a mental state of reckless indifference to the value of human life.

however, are reviewable under the clearly erroneous standard. Fed. R. Civ. P. 52(a); Morrow v. Parratt, 574 F.2d 411, 413 (8th Cir. 1978); see also Martin, 796 F.2d at 817.

IV. DISCUSSION.

The State points to a number of flaws in the district court's opinion. We find three of these flaws serious enough to mandate reversal.

First, although it is unclear whether the district court intended to do so, it appeared to set out an erroneous legal test for determining ineffective assistance of counsel, a test that departs from the one the Supreme Court set out in Strickland v. Washington, 466 U.S. 668 (1984). Second, the district court erroneously considered and in part based its conclusion of ineffective counsel on a claim that was not raised in the state courts and was therefore not properly before the district court. Third, as to the claims properly before it, the district court reached a conclusion of ineffective assistance of counsel that was not supported by the state court factual findings.

A. Erroneous Legal Test for Ineffectiveness of Counsel.

The State argues that the district court wrongly established a per se rule, by holding that trial counsel would be found ineffective whenever a defendant received the death penalty and counsel had offered no evidence in mitigation. The State argues that such a per se rule flies in the face of both Strickland v. Washington, 466 U.S. 668 (1984), and Darden v. Wainwright, 106 S.Ct. 2464 (1986), because in both cases no mitigating evidence was put on in the punishment phase, yet the death sentences were upheld. Examining the district court's analysis and the applicable cases, we agree with the State's argument.

The district court found that counsel's decision not to

present mitigating evidence was based on: (1) his belief that a jury would not impose the death penalty since Laws had not directly participated in the killings; (2) his discussion with a juror from Laws' earlier capital murder case indicating that the jury had decided not to impose the death penalty because of a deal, also applicable to this case, the State had made with Gilmore; and (3) his phone conversations with one of Laws' brothers and a woman he thought was Laws' stepmother. The court found that these three factors did not represent:

> a reasonably thorough investigation into petitioner's character and background or into other information potentially relevant to mitigating circumstances. The record does not reflect counsel's investigation of petitioner's military or psychiatric background for purposes of the punishment phase of the trial. Nor does the record reflect a responsible effort to glean available relatives' own knowledge of and relationship to petitioner * * * .

Mem. Op. at 22.

Calling counsel's decision to offer no evidence at the penalty phase "a bold tactic," the court stated that: "Had it succeeded, its brilliance may have been unquestioned. Having failed, it must be considered beyond the bounds of professional norms." The court concluded:

> Trial counsel may well believe he had reasonable grounds for the decision he reached in the death penalty phase of this cause. Nonetheless, that decision was wrong. * * * To a certain extent, we risk developing a body of law that says at the death penalty phase defense counsel must introduce some evidence or be found ineffective, while it is certainly possible and sometimes probable that putting on and offering evidence may worsen the client's chances. Perhaps this ruling stresses only the importance of fully investigating each case on its merits before deciding that as a matter of reasonable strategy, no evidence should be introduced.

Mem. Op. at 25.

Although the district court's conclusion may purport not to create a new rule in this area of the law, we nonetheless think that the court's reasoning is inconsistent with Supreme Court precedent, specifically, the Strickland and Darden decisions.

The district court's analysis is incorrect for the reason that the test set out in Strickland for determining whether counsel has functioned effectively is not outcome-determinative. Merely because a person was convicted does not mean the person received ineffective assistance of counsel. As Strickland and Darden make clear, the decision not to present evidence at the penalty phase is well within the range of practical choices not to be second-guessed, if the decision is based on an informed and reasoned judgment.

Strickland involved a challenge to counsel's handling of the sentencing portion of a death penalty capital murder case. To prepare for the sentencing hearing before the judge, counsel spoke to the defendant about his background. He also spoke on the telephone with defendant's wife and mother, though he did not follow up on one unsuccessful effort to meet with them. He did not otherwise seek out character witnesses. Nor did he request a psychiatric examination, since his conversations with the defendant gave no indication that he had psychological problems. Counsel decided not to present and hence not to look further for evidence concerning the defendant's character and emotional state. Counsel's rationale was in part that by forgoing the opportunity to present new evidence on these subjects, he prevented the State from cross-examining the defendant on his claim and from putting on psychiatric evidence of its own. At the sentencing hearing, counsel's strategy was based primarily on the trial judge's prior remarks and his reputation as a sentencing judge who thought it important for a convicted defendant to own up to his crime. Counsel argued that

the defendant's remorse and acceptance of responsibility for his crime, his total lack of prior criminal conduct, the fact that he surrendered, confessed, offered to testify against a co-defendant, and the fact that he was a good person gone wrong under stressful circumstances all combined to justify sparing him from the death penalty. The strategy failed, and the trial judge sentenced the defendant to death.

The Supreme Court found that defendant's counsel had not been ineffective. Counsel had made:

> a strategic choice to argue for the extreme emotional distress mitigating circumstance and to rely as fully as possible on respondent's acceptance of responsibility for his crimes. * * * Counsel's strategy choice was well within the range of professionally reasonable judgments, and the decision not to seek more character or psychological evidence than was already in hand was likewise reasonable. * * * The aggravating circumstances were utterly overwhelming. Trial counsel could reasonably surmise from his conversations with respondent that character and psychological evidence would be of little help. * * * On these facts, there can be little question, even without application of the presumption of adequate performance, that trial counsel's defense, though unsuccessful, was the result of reasonable professional judgment.

Strickland, 466 U.S. at 699. (Emphasis added.)

Darden v. Wainwright, 106 S.Ct. 2464 (1986), presented a similar scenario. In Darden, a Florida defendant who had been sentenced to death for murder argued that he was denied effective assistance of counsel at the sentencing phase of trial. He argued that his team of trial counsel did not delve sufficiently into his background, and as a result were unprepared to present mitigating evidence at the sentencing hearing. Counsel knew that they were free to offer mitigating evidence, yet they chose not to do so. The Court, noting that Strickland requires judicial scrutiny of counsel's performance to be highly deferential, stated:

> In this case, there are several reasons why counsel reasonably could have chosen to rely on a simple plea for mercy from petitioner himself. Any attempt to portray petitioner as a non-violent man would have opened the door for the State to rebut with evidence of petitioner's prior convictions. * * * In addition, * * * the State could have responded with a psychiatric report * * *. In sum, petitioner has not "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" * * * Petitioner has failed to satisfy the first part of the Strickland test, that his trial counsels' performance fell below an objective standard of reasonableness.

Darden, 106 S.Ct. at 2474-75, quoting Strickland, 466 U.S. at 689.

The Supreme Court recently reaffirmed this standard in Burger v. Kemp, 107 S.Ct. 3114 (1987). In Burger, a Georgia jury found the defendant guilty of murder and sentenced him to death. The Supreme Court, noting the high degree of deference given to counsel on a claim of ineffectiveness, rejected the defendant's contention that his trial counsel had been ineffective for failing to develop and present any mitigating evidence at either of the two sentencing hearings.

In Burger, the potential mitigating evidence would have disclosed that the defendant had an unhappy and unstable childhood. Trial counsel was aware of some, but not all, of this family history before trial. After speaking with the defendant's mother, a psychologist, and others, counsel "made the reasonable decision that his client's interest would not be served by presenting this type of evidence." Burger, 107 S.Ct. at 3124. Counsel decided not to put the defendant's mother on the stand because her testimony might have been counterproductive, and the Court noted that "it was surely not unreasonable for [counsel] to have concluded that cross-examination might well have revealed matters of historical fact that would have harmed his client's chances for a life sentence." Id. at 3125. The Court concluded:

> The record at the habeas corpus hearing does suggest that [counsel] could well have made a more thorough investigation than he did. Nevertheless, in considering claims of ineffective assistance of counsel, "[w]e address not what is prudent or appropriate, but only what is constitutionally compelled." United States v. Cronic, 466 U.S. 648, 665, n.38 (1984). We have decided that "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Strickland, 466 U.S., at 690-691. Applying this standard, we agree with the courts below that counsel's decision not to mount an all-out investigation into petitioner's background in search of mitigating circumstances was supported by reasonable professional judgment. It appears that he did interview all potential witnesses who had been called to his attention and that there was a reasonable basis for his strategic decision that an explanation of petitioner's history would not have minimized the risk of the death penalty. Having made this judgment, he reasonably determined that he need not undertake further investigation to locate witnesses who would make statements about [the defendant's] past.

Id. at 3125-26.

Applicable circuit court decisions are in accord. See Lightbourne v. Dugger, 829 F.2d 1012, 1025-26 (11th Cir. 1987); Robison v Maynard, 829 F.2d 1501, 1504-05 (10th Cir. 1987); Bell v. Lynaugh, 828 F.2d 1085, 1089-90 (5th Cir.), cert. denied, ____ S.Ct. ____ (No. 87-5638)(Nov. 2, 1987); Brock v. McCotter, 781 F.2d 1152, 1160 (5th Cir.), cert. denied, 106 S.Ct. 2259 (1986).[7]

[7]The Brock court rejected an outcome-determinative analysis as follows:

> We believe that Brock's inconsistent analysis perfectly illustrates the discretionary nature of defense counsel's task. There are significant risks which inhere in any tactic adopted by the defense. The question we must answer is not whether defense counsel's tactics produced damage but, rather, whether those tactics were unreasonably risky.

Laws points to a number of cases in which counsel was found ineffective for having failed to present mitigating evidence. In these cases, however, the key to a finding of ineffectiveness was not that the mitigating evidence was not presented, but that counsel, as a result of inadequate preparation, had failed to discover the evidence. Contrary to the district court's apparent reasoning in this case, the fact that mitigating evidence is not set forth does not inexorably lead to a conclusion of ineffective counsel. One must look further as to why the mitigating evidence was not produced. If counsel has through neglect failed to discover such evidence, then counsel will be found ineffective. If, however, the mitigating evidence is not produced because counsel, after a reasonable investigation and exercise of professional judgment, has determined that withholding such evidence is the more strategically sound course, then there has been no ineffectiveness.[8]

Kimmelman v. Morrison, 106 S.Ct. 2574 (1986), cited by Laws, supports this view. In Kimmelman, the defendant was indicted for

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Brock, 781 F.2d at 1160. The court went on to hold that counsel was not ineffective for introducing evidence of petitioner's drug use and troubled childhood. The court noted that this information, like Laws' family testimony or information pertaining to his personality, is susceptible to dual interpretation.

[8]The district court appears to have rested its decision on two bases. The first basis, as we have discussed, is that because counsel presented no evidence in mitigation, he was therefore ineffective. However, as we note, the correct test is not whether there was no mitigating evidence, but rather, whether the lack of mitigating evidence was the result of adequate investigation and sound strategy. The district court also appeared to conclude, as a second, independent basis for decision, that even under the established Strickland test, counsel was ineffective for having conducted inadequate investigation. As we discuss in Section IV(C) of this opinion, we think the district court's analysis on this ground was also incorrect.

rape. Among the items of evidence used at trial was a stained bed sheet, which was obtained from defendant's apartment without a search warrant. At trial, counsel objected to the introduction of the sheet and testimony concerning it. State law, however, required that suppression motions be filed within thirty days of the indictment. Because the time limit had long since passed, the trial judge denied the motion as late. Ultimately, defendant was convicted. The Supreme Court observed that trial counsel "failed to file a timely suppression motion, not due to strategic considerations, but because, until the first day of trial, he was unaware of the search and of the State's intention to introduce the bedsheet into evidence." Kimmelman, 106 S.Ct. at 2588. Counsel was unaware of the search and seizure because he had failed to conduct any pretrial discovery. Again, this failure was not based on strategy, but on counsel's erroneous belief that the State was obligated to turn over inculpatory evidence to the defense before trial and that the victim's preferences would determine whether the State proceeded to trial after an indictment had been returned. The Court found that counsel's failure to conduct any discovery was "unreasonable, that is, contrary to prevailing professional norms. * * * Respondent's lawyer neither investigated, nor made a reasonable decision not to investigate, the State's case through discovery." Counsel had a "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Kimmelman, 106 S.Ct. at 2588-89.

Laws also cites Morrow v. Parratt, 574 F.2d 411 (8th Cir. 1978); Eldridge v. Atkins, 665 F.2d 228 (8th Cir. 1981), cert. denied, 456 U.S. 910 (1982); and Woodard v. Sargent, 806 F.2d 153 (8th Cir. 1986). As in Kimmelman, however, these cases stand for the proposition that inadequate trial preparation and investigation equal ineffective assistance of counsel, not the fact, standing alone, that potentially mitigating evidence is not introduced. In Morrow, the court found that the defendant's lawyer had failed to adequately investigate the facts before

advising his client to plead guilty and had failed to interview any eyewitnesses to the crime. The court concluded: "In summary, the evidence described above could have been uncovered by a reasonable investigation by Morrow's attorney." Morrow, 574 F.2d at 414.

In Eldridge, defense counsel did not interview any of the eyewitnesses to the robbery. "Counsel did not investigate because he conclusorily decided that Eldridge was guilty and that further investigation would not do any good." Eldridge, 665 F.2d at 235. Noting also that counsel's failure to use certain witnesses was not so much trial strategy as it was an accommodation to his own inadequate trial preparation, the court concluded that: "Counsel need not attain perfection, but he must exercise reasonable diligence to produce exculpatory evidence." Id.

Finally, in Woodard, a capital murder case, counsel was found ineffective for failing to request a jury instruction on a new mitigating circumstance which had been added to the pertinent statute shortly before the case was tried. The jury found two aggravating circumstances and no mitigating circumstances. Accordingly, the court found:

> A finding of a mitigating circumstance should have been an important objective in Woodard's case, and the failure to seek the inclusion of this obvious mitigating circumstance certainly fell below the threshold of reasonably competent assistance. * * * [W]e can conceive of no possible tactical reason for such an omission.

Woodard, 806 F.2d at 157.

As these cases show, it is not the failure to present mitigating circumstances, but rather the reasons for the failure to present mitigating circumstances, that are the proper subject

for judicial scrutiny. Therefore, we hold that the district court erred in setting out a per se rule in this regard.

B. Whether the District Court Properly Considered Laws' "Vietnam Experience."

We find the district court erred in another significant respect. In his habeas corpus petition, Laws argued that his trial counsel was ineffective for failing to present mitigating evidence relating to his time spent in Vietnam and its effect on him. The State argued before the district court, and argues here, that Laws may not raise his "Vietnam experience" argument in federal court. The State maintains that because Laws failed to raise an issue concerning Vietnam either during his Rule 27.26 litigation in Missouri state court or on appeal from the denial of Rule 27.26 relief, this claim is subject to procedural default and alternatively, that the claim is unexhausted because the Missouri courts have not been provided with a fair opportunity to apply controlling legal principles to the facts bearing upon his claim of ineffective counsel.

The district court found, however, that the exhaustion rule was not a bar to consideration of Laws' claims.[9] Although the court noted that Laws had not raised an argument concerning his Vietnam experience before the state courts, it nonetheless found that argument to be "part and parcel" of Laws' claims concerning mental health and family testimony. The court concluded that "[e]ither type of evidence [mental health evidence or the testimony of relatives] could have elicited information regarding petitioner's military service or his pre-service and post-service

[9]The exhaustion doctrine is fully applicable to cases involving the death penalty. In Strickland, a capital murder case in which the death penalty was upheld, the Supreme Court noted that while the exhaustion rule was not jurisdictional, it was nonetheless "to be strictly enforced." Strickland, 466 U.S. at 684.

well-being." Mem. Op. at 19-20. The district court, in sum, held that because evidence regarding Laws' military service and its effect on him could have surfaced through evidence as to his general mental health or through the testimony of family members, that the Vietnam claim was part and parcel of both the mental health and family testimony claims, and thus the claim had been exhausted and was properly before the district court.

We believe this issue requires a more thorough examination. The "total exhaustion" rule was first announced in Rose v. Lundy, 455 U.S. 509, 522 (1982). Under this rule, every claim raised in the petitioner's federal habeas corpus petition must be "exhausted" before the federal court can review the merits of any claim in the petition. There are two independent steps to exhausting a claim. First, the petitioner must have fairly presented the federal constitutional dimensions of his federal habeas corpus claim to the state courts. 28 U.S.C. § 2254(b). If the petitioner has not fairly presented the federal constitutional dimensions of his claim to the state courts, he will still meet the exhaustion requirement if there are no currently available, non-futile state remedies through which he can present the federal constitutional dimensions of his claim to the state courts. 28 U.S.C. § 2254(b) and (c). Thus, the "question with respect to exhaustion is not merely whether [the petitioner] has in the past presented his federal claim to the state courts, but also whether there is, under the law of Missouri, any presently available state procedure for the determination of the merits of that claim." Thomas v. Wyrick, 622 F.2d 411, 413 (8th Cir. 1980).

With this background in mind, we must determine whether Laws' "Vietnam experience" argument is indeed "part and parcel" of the mental health claim he properly raised in the state courts. In other words, we must decide whether his Vietnam experience claim has been fairly presented to the state courts.

This issue must be resolved as a matter of federal law, not state law. Rodgers v. Wyrick, 621 F.2d 921, 927 (8th Cir. 1980).

The purpose of the fair presentation component of the exhaustion requirement is to give the state courts the first opportunity to review federal constitutional issues and to correct federal constitutional errors made by the state's trial courts. Thus, a petitioner need give only the substance of his claim to the state courts. But to do so, the petitioner must include the same facts and legal theories to the state court that he seeks to present to the federal court so that the state court can apply the controlling legal principles to the facts bearing upon his federal constitutional claim. Picard v. Connor, 404 U.S. 270, 277 (1971). To reiterate, "the petitioner must have informed the state court of both the factual and the legal premises of the claim he asserts in federal court." Daye v. Attorney General of State of New York, 696 F.2d 186, 191 (2d Cir. 1982) (en banc). (Emphasis added.)

We accept that the legal basis for Laws' "Vietnam experience" claim is the same as was before the state courts. Throughout the Rule 27.26 litigation and in the federal courts, Laws has claimed a denial of effective assistance of trial counsel, in contravention of the sixth amendment, as a result of inadequate effort by counsel to investigate his mental state. In this respect, a claim that Laws' psychiatric condition was heavily influenced by his time in Vietnam is indeed "part and parcel" of his claim as to ineffective assistance of counsel.

Whether the factual basis for this claim was before the state courts is a different matter, however. It is well-settled that a petitioner must present the state courts with precisely the same factual underpinnings of his federal constitutional argument that the petitioner wishes to use to support his claim in his federal habeas corpus petition. Thus, if in federal court

the petitioner relies on facts that give the case a significantly different and stronger evidentiary posture than it had when the state courts considered it, the state courts must be given an opportunity to consider the evidence. Joyner v. King, 786 F.2d 1317, 1319-20 (5th Cir.), cert. denied, 107 S.Ct. 653 (1986).

The Sixth Circuit undertook an extensive survey of cases on this subject in Sampson v. Love, 782 F.2d 53 (6th Cir.), cert. denied, 107 S.Ct. 159 (1986). The court found cases from the First, Second, Fifth, Ninth and Tenth Circuits, all holding that where a habeas corpus petitioner presents new facts to the federal court that were not presented to the state courts, the petition should be dismissed to give the state courts the first opportunity to consider the claim in light of the new facts. Domainque v. Butterworth, 641 F.2d 8 (1st Cir. 1981) ("petitioner's 'ineffective assistance of counsel' claim depended in large measure on factual allegations outside the record on direct appeal to the state courts"); United States ex rel. Boodie v. Herold, 349 F.2d 372 (2d Cir. 1965) ("The state courts have not been given any opportunity to pass upon these important [constitutional] questions in the light of all the relevant facts"); Brown v. Estelle, 701 F.2d 494 (5th Cir. 1983) ("The state courts must have had an opportunity to pass on the claim in light of a full record and where the factual basis for a claim was not presented to the state courts, the claim is unexhausted"); Schiers v. People of State of California, 333 F.2d 173 (9th Cir. 1964) ("state remedies had not been exhausted because petitioner's contention rests upon a cumulation of many asserted delinquencies not heretofore presented to the state courts"); Jones v. Hess, 681 F.2d 688 (10th Cir. 1982) ("A federal claim is unexhausted where it presents 'a materially different claim and stronger evidentiary case' than was before the state court").

This court reached the same conclusion in Stranghoener v. Black, 720 F.2d 1005 (8th Cir. 1983). In Stranghoener, the

petitioner claimed that his guilty plea was not entered voluntarily and alleged several factual reasons why it was not voluntary; e.g., drugs and ineffective assistance of counsel. Some of these factual reasons were not presented to the state courts. The Stranghoener court held that the petitioner had not fairly presented the involuntary guilty plea claim to the state courts because of the different factual basis for the claim. The court ruled: "we hold that a federal claim is not 'fairly presented' to the state courts when factual allegations significantly affecting the determination of that claim are raised for the first time in federal court." Stranghoener, 720 F.2d at 1007. See also Tyler v. Wyrick, 730 F.2d 1209, 1210 (8th Cir.), cert. denied, 469 U.S. 838 (1984).

Laws' argument concerning his "Vietnam experience" falls squarely within the reasoning of these cases. The argument concerns Laws' service record, including in its scope facts about his combat experience, his citations received for duty, and his discharge record. As the State points out, the argument also opens the door to cross-examination as to facts about Laws' drug usage while in the service, an auto theft charge, and an AWOL conviction. The argument also concerns Laws' mental state, including in its scope facts about his personality before and after his military service, revealed through psychological tests and family perceptions. Introduction of these facts opens the door to cross-examination as to whether Laws' disturbed mental state resulted not from his time in Vietnam but from his more than six years in prison. None of these facts were before the state courts. The state courts were never presented with or given the opportunity to consider a "Vietnam experience" claim. Accordingly, Laws' many factual allegations concerning Vietnam make his claim a different one from that presented to the state courts. We therefore hold that Laws has not properly exhausted this claim in the state court system.

The next step in our analysis is to determine whether there

are any currently available, non-futile state remedies through which Laws can present his claim to the state courts. If such avenues exist, we must dismiss Laws' petition. He would then have the option of either returning to state court to present his unexhausted claims, or amending his petition to delete the unexhausted claims, then resubmitting to the federal court the fully exhausted petition. See Rose v. Lundy, 455 U.S. 509 (1982). Our study of Missouri law leads us to conclude that such a state remedy is not available to Laws. In Eaton v. Wyrick, 528 F.2d 477, 482 (8th Cir. 1975), this court stated that "[o]nly after some clear manifestation on the record that a state court will not entertain petitioner's constitutional claims even if fairly presented will the exhaustion requirement be disregarded as futile." Accord, Smallwood v. Missouri Board of Probation and Parole, 587 F.2d 369, 371 (8th Cir. 1978); Rodgers v. Wyrick, 621 F.2d 921, 925 (8th Cir. 1980).

In Lindner v. Wyrick, 644 F.2d 724 (8th Cir.), cert. denied, 454 U.S. 872 (1981), this court examined this issue under Missouri law in the context of a successive Rule 27.26 motion. The court noted that Missouri courts have strictly construed the provision in Rule 27.26 that a second motion to vacate a sentence shall not be entertained when the grounds in the second motion could have been raised in the original motion. Lindner, 644 F.2d at 726-27. Under Missouri law, the result of the proceeding on the first post-conviction motion forecloses both those claims which were alleged and those claims which could have been alleged but were not. Furthermore, where the defendant possessed information upon which the second motion was based at the time when he filed the first motion, an allegation as to ineffective assistance of counsel in preparing the first post-conviction motion will not afford a basis for a second post-conviction motion. Id. at 727 n.4. The Lindner court, however, recognizing that Rule 27.26 does not necessarily and absolutely foreclose a state court from entertaining a second or successive post-conviction motion, reaffirmed the Eaton rule requiring a clear

indication in the state record that further state proceedings would be futile before abandoning the exhaustion requirement. Because Missouri law governing successive Rule 27.26 motions is clear, and because we find an equally clear indication in the state record that such a motion would not be heard in this case, we conclude that no point would be served by sending Laws back to state court to attempt to gain a hearing on this issue.

As we read the record, it is indisputable that Laws' argument relating to Vietnam was available to him and his counsel when he made his Rule 27.26 motion. In an affidavit prepared in support of his federal habeas petition, Laws stated: "During my trial preparation for the Williams case, [trial counsel] and I discussed very briefly my service in the army and in Vietnam from 1967 to 1970. I told him I had an honorable discharge. He never asked me about it again." During his closing argument of the punishment phase of Laws' trial, Laws' counsel mentioned that Laws had spent time in Vietnam: "when I was in Vietnam, I killed somebody. Okay, I killed somebody. I had to. Leonard Laws was in Vietnam. I killed somebody in those circumstances and I can remember the day, March 17th." Tr. Vol. II at 808. We also note that the Missouri trial judge who sentenced Laws was aware that Laws had been in Vietnam. The trial judge had before him the report of the presentence investigation on Laws, which revealed that Laws had spent time in Vietnam and had been honorably discharged from the United States Army.

The foregoing leads us to conclude that Laws had available to him the "Vietnam experience" claim at the time of his first Rule 27.26 motion, and that under Missouri law, a successive Rule 27.26 motion on this ground would not be granted and is therefore futile.

Because we conclude that Laws has no currently available state remedies, we proceed to the next step in the analysis.

Because Laws' "Vietnam experience" claim was not fairly presented to the state courts, nor can it now be, we examine whether Laws can demonstrate (1) adequate cause to excuse his failure to raise the claim in state court properly, and if he can show such cause, then he must also show (2) actual prejudice to his defense resulting from the state court's failure to address the merits of the claim. See Wainwright v. Sykes, 433 U.S. 72 (1977).

The fact that defense counsel failed to recognize the factual or legal basis for a claim or failed to raise the claim despite recognizing it does not constitute "cause." Murray v. Carrier, 106 S.Ct. 2639, 2645 (1986). Attorney error or inadvertence short of ineffective assistance of counsel does not constitute "cause." Instead, the existence of "cause" must ordinarily turn on whether the petitioner can show that some objective factor external to the defense impeded counsel's efforts to comply with the state procedural rule. Id. at 2645-46. A defendant represented by an attorney whose performance is not constitutionally ineffective under Strickland bears the risk of attorney error that results in a procedural default. The "cause" recognized by the Murray Court was "cause" that would be in itself an independent ground for relief, justifying habeas corpus relief.[10] In summary, allegations and proof of "cause" must rise to the level of constitutionally-cognizable ineffective assistance of counsel before the "cause" prong of Wainwright v. Sykes is met. Murray v. Carrier, 106 S.Ct. at 2644-46; Smith v. Murray, 106 S.Ct. 2661, 2667 (1986). Such a claim of ineffective assistance of counsel must be first presented to the state courts

[10]We note that a petitioner cannot prove "cause" with a claim of ineffective assistance of Rule 27.26 trial counsel or appellate counsel since that claim cannot be an independent ground for relief justifying habeas corpus relief. See Williams v. State of Missouri, 640 F.2d 140, 143-44 (8th Cir.), cert. denied, 451 U.S. 990 (1981); accord, Kirby v. Dutton, 794 F.2d 245, 247 (6th Cir. 1986); Mitchell v. Wyrick, 727 F.2d 773, 774 (8th Cir.), cert. denied, 469 U.S. 823 (1984).

as an independent claim before it may be used to establish cause for a procedural default. Murray v. Carrier, 106 S.Ct. at 2646.

Laws has presented no reasons whatsoever for his failure to raise the "Vietnam experience" claim in state court. Moreover, he has made no allegations of ineffectiveness of counsel against any of his appellate counsel. We therefore conclude that Laws has not shown cause for his failure to raise his "Vietnam experience" claim in state court. In light of this conclusion, it is unnecessary for us to examine whether Laws suffered prejudice to his defense as a result of that failure.

To summarize, we hold that because Laws failed to raise his "Vietnam experience" claim before the state courts, and cannot demonstrate adequate cause for that failure, that claim was not congnizable on federal habeas corpus review, and it was error for the district court to consider it.

C. Whether the District Court's Assessment of the Evidence was Erroneous.

Even if the district court had not created a framework for analysis that departs from established Supreme Court precedent (see supra section IV(A) of this opinion), we think the district court's assessment of the evidence, even under the correct standards, would mandate reversal. The district court concluded, applying the Strickland standards, that counsel had made an inadequate investigation and was thus ineffective. We believe this conclusion was contrary to the evidence. Presuming as we must the state court's factual findings to be correct, as required by 28 U.S.C. § 2254(d),[11] we are compelled to conclude

[11]The State argues that the state court's factual findings, which are supported by the record, are entitled to the

that Laws received effective assistance of counsel.

Laws' arguments which the district court considered, and which are properly before this court, are as follows:

> (1) Trial counsel failed to adequately investigate or introduce any evidence concerning Laws' mental state;
>
> (2) Trial counsel failed to contact members of Laws' family so that they could testify on his behalf; and
>
> (3) Trial counsel failed to present testimony from a statistician, priest and/or psychologist in opposition to the imposition of the death penalty.

We consider each issue in turn. Our analysis is governed by Strickland v. Washington, 466 U.S. 668 (1984). Under Strickland, a petitioner alleging ineffective assistance of counsel must prove two independent components:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

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presumption of correctness mandated by 28 U.S.C. § 2254(d). Laws argues, however, that the presumption of correctness is inapplicable because material facts were not adequately developed at the state court hearing, 28 U.S.C. § 2254(d)(3), and because the state court's factual determinations are not fairly supported by the record reviewed as a whole by the federal court, 28 U.S.C. § 2254(d)(8). We conclude, however, that Laws' arguments in this regard are belied by the record, which shows that material facts were adequately developed and had fair support in the record.

Strickland, 466 U.S. at 687.

Turning first to examine whether counsel's performance was deficient, we note that the defendant must show that counsel's representation fell below an objective standard of reasonableness, considering all the circumstances. We recognize that our scrutiny of counsel's performance must be highly deferential, in view of the wide latitude counsel must have in making tactical decisions. We must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Strickland, 466 U.S. at 689.[12]

With these standards in mind, we examine Laws' three claims.

1. Failure to Adequately Investigate Laws' Psychological Background.

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[12]During the Rule 27.26 hearing, the following information concerning Laws' trial counsel came to light. He had been licensed to practice law in Missouri since 1975. After serving as a law clerk in the Missouri Court of Appeals and an assistant prosecuting attorney in St. Louis County for two years, he entered private practice, where, according to his estimate, ninety-five percent of his work was in criminal law. He handled approximately fifty felonies a year, and at the time of the hearing, had tried between twenty-five and thirty jury trials, as well as having briefed and argued criminal appeals. He represented Laws in both the Elliott and Williams murder trials and testified that he spoke with Laws for six or more hours on the Elliott trial, and spent additional time with him before the Williams trial. He further estimated that he spent about four hundred hours preparing for both murder trials. The two trials involved substantial overlap in witnesses and preparation. Finally, the chief trial attorney for the St. Louis Public Defender's office testified at the hearing that Laws' trial counsel had "an excellent reputation" as a defense lawyer in the community.

Laws makes the argument, maintained throughout the state court post-conviction proceedings, that his trial counsel failed to adequately investigate his past psychiatric treatment record and to explore a possible psychologically-based defense. Laws had undergone a psychiatric examination in the Mississippi State Hospital in 1974-75 while serving time in the Mississippi Penitentiary on an aggravated assault charge. Trial counsel, however, relied on a psychiatric exam of Laws conducted on September 22, 1981, at the Fulton State Hospital in connection with one of the two other capital murder charges which had been brought against Laws. The Fulton State Hospital examination, which took into account Laws' prior Mississippi examination, concluded that Laws was mentally capable of standing trial, and that he was able to know and appreciate the nature, quality and wrongfulness of the murders when he had committed them and had been capable of conforming his conduct to the requirements of the law. The record regarding this issue at the Rule 27.26 hearing is as follows:

> Q. What were the results of this examination that you were aware of before the trial?
>
> A. The findings were, from Roman Numeral VIII, that the accused had no mental disease or defect within the meaning of Section 552.010, and that Leonard had the capacity to understand the proceedings against him and knew and appreciated the nature and wrongfulness of his conduct.
>
> Q. And do they also, on page four of this document, talk about an evaluation in Mississippi and what the diagnosis there was?
>
> * * * *
>
> A. It states that he was given the diagnosis of anti-social personality and situational reaction of adult life.
>
> Q. So the doctor in the examination you reviewed also considered this Mississippi evaluation, is that right?
>
> A. Yes.

Q. Now, you said besides this examination in Defendant's Exhibit B, you also considered Leonard Laws, his background, and your conversations with him. And what did you glean from that, if anything?

A. Well, in my conversations with him I didn't detect--again, its a lay opinion. But I didn't detect any mental disease or defect that would interfere with our preparing to go to trial, or for his standing trial.

Q. All right. And so was that ever a plan, or a possible defense in your mind, a viable defense in any way to claim any mental disease or defect, based on your evaluation of this case?

A. Well, I considered it, but I rejected it.

(Emphasis added.)

Q. Did Leonard at any time ever insist that he should be evaluated, or that he was insane in any way?

A. I don't recall that, no.

[Rule 27.26 Tr. at 73-74.]

* * * *

Q. [D]id you read through that psychiatric report when you represented Mr. Laws?

A. While I represented him, yes.

Q. And in that report, do you recall the term "situational reaction," that Mr. Laws suffered from problems with situational reactions?

A. Yes.

Q. And did you speak to the psychiatrist who prepared that report about what a situational reaction was?

A. No. I didn't.

Q. And at this time, do you know what a situational reaction is?

A. A situational reaction does not rise to the level of mental disease or defect. I know that.

Q. But you did not investigate, at the time you represented Mr. Laws, exactly what a situational reaction was, what the scope of that was?

A. What the scope of it was, I have an understanding what it is. But I don't know the actual scope of it. And again, I read it. It was in the context of the individual's finding that there was no mental disease or defect.

(Emphasis added.)

Q. Right. But when you represented Mr. Laws and read this report, did you at any time talk to a psychiatrist or psychologist about what types of incidents aggravate situational reactions?

A. No, I didn't.

[Rule 27.26 Tr. at 83-84.]

The Rule 27.26 court, after hearing this testimony, found as fact that Laws:

> never gave any indication to his trial attorney or the trial court that he was mentally incompetent at the time of the trial herein or at the time of the offenses. In fact [Laws] had been examined on September 22, 1981, prior to the trial with respect to a third murder case against [Laws] in Washington County. The results of that examination show that [Laws] had no neurosis or psychosis.

The court then concluded that "There was no indication or evidence which required a new mental examination of [Laws]. Mental examination conducted pursuant to Chapter 552, further shows that [Laws] had no significant mental problems."

In reviewing the Rule 27.26 transcript and findings and conclusions of the Rule 27.26 court, the Missouri Court of Appeals found that "[c]lose examination of the transcript reveals that [trial counsel] made a reasoned strategic decision based on all the circumstances to refrain from putting on evidence at trial of [Laws'] psychiatric state." Laws v. State, 708 S.W.2d 182, 185 (Mo. App. 1986). The court concluded:

> The evidence at movant's 27.26 hearing convinces us that [trial counsel] made a careful and conscious choice against putting on psychiatric evidence during trial or at the penalty stage. Nothing made known to counsel during his representation of movant, and extensive interviews with him, suggested to counsel that presenting evidence of movant's psychiatric state would be of any benefit in his defense. Counsel had a duty to make reasonable investigations or to make a reasonable decision that makes a particular investigation unnecessary. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. at 2067. Counsel could have well reasoned that the jury would be more harsh with movant as a result of learning that his behavior could be erratic and violent. Contrary to movant's contention that counsel failed to ascertain the meaning and import of a "situational reaction," our review of the record leads to the conclusion that counsel was fully cognizant of the nature of this disorder and decided as a matter of sound trial strategy that it would not be helpful.
>
> [Counsel's] informed choice of trial strategy to refrain from presenting psychiatric evidence at trial or during the penalty stage rendered it unnecessary to engage in further inquiry into movant's psychiatric state.

Id. at 186.

The district court found, however, that trial counsel's decision not to present psychiatric evidence "was not based on a reasonably thorough investigation into [Laws'] character and background or into other information potentially relevant to mitigating circumstances. The record does not reflect counsel's investigation of [Laws'] military or psychiatric background for purposes of the punishment phase of the trial." Mem. Op. at 22.

We believe, however, that the record reveals that counsel acted well within the bounds of professional competency. The state court findings of fact were entitled to a presumption of correctness pursuant to 28 U.S.C. § 2254(d). We accept the state courts' legal conclusion of effectiveness based on those facts.

Counsel could easily have concluded that the decision to present psychological testimony would have disastrous consequences. Skillful cross-examination could have revealed that although Laws suffered from no mental impairment that would negate responsibility for the murders he had committed, he was nonetheless a maladjusted man with a propensity for violence. In view of the fact that Laws' psychological history revealed to counsel that he had no mental disease or defect, as well as the fact that in their interviews, Laws appeared normal and made no mention of any psychological impairment, for counsel to have nonetheless raised the issue of Laws' mental state at trial could have induced cross-examination which would make counsel appear devious or unprepared, as well as alienating the jury against his client.

In sum, we conclude that under Strickland, counsel conducted an adequate investigation into a possible psychologically-related defense, and his performance in this regard cannot be considered deficient.

2. Failure to Contact and Interview Relatives.

Laws argues that his counsel erred in failing to adequately pursue an investigation of relatives who would be willing to testify on Laws' behalf. Again, this argument is contradicted by the facts as brought out in the Rule 27.26 hearing. The hearing transcript reveals the following:

> Q. Now, other than George Gilmore, did Leonard Laws also request that you call some members of his family to testify, at least to the death penalty phase of that, if it came to that?
>
> A. Yes, he did. He gave me a phone number of an individual which was either his father's trailer or his stepmother's trailer. I am not sure which. And it was in rural Missouri. I am not sure where it was. And I called numerous times.
>
> Q. Did you get ahold of anyone?

> A. I finally did, yes. I finally got ahold of the woman. And I don't recall her name right now, I'm sorry. But the woman who Leonard gave me her phone number. And it was late at night one night when I happened to catch her. And I explained to her that we wished her to testify perhaps in the death phase of the case.
>
> Q. What was her response?
>
> A. She refused.
>
> (Emphasis added.)
>
> Q. Did she give you any reason why she or Leonard Laws' family might be upset with him and why they wouldn't want to testify?
>
> A. She stated that she didn't wish to help Leonard in this case, and she didn't--she knew that the other family members didn't wish to help. I believe I spoke with one of his brothers, too. I am not sure of that. I just saw that that was amended today, and I didn't have an opportunity to look over my records. But I believe I spoke with one of his brothers.
>
> (Emphasis added.)
>
> Q. But in any case, you made some efforts, but you couldn't get any of them to testify?
>
> A. In the death phase, they were most adamant about not testifying.
>
> (Emphasis added.)
>
> Q. But you pursued that as being a possible advantage to have?
>
> A. In any death case, you wish to have someone, a relative to testify, to show that he has people who care enough to come in and testify.
>
> [Rule 27.26 Tr. at 77-78.]

The Rule 27.26 court found as fact that trial counsel "contacted relatives of [Laws] by calling a phone number [Laws] supplied. Two different persons told [trial counsel] that the relatives would not testify on Leonard Laws's behalf." The court

concluded that there was no deficiency on this ground, and the Missouri Court of Appeals agreed:

> After multiple attempts to obtain relatives to testify for movant at the penalty hearing [counsel] was able to contact a woman he believed to be movant's step-mother and a brother. Both persons stated unequivocably that they would not testify at the penalty hearing and that other relatives would also not testify. [Laws] himself testified that he personally wrote his brothers and father requesting them to testify on his behalf, but they failed to appear for trial. Furthermore, [Laws] did not present family members as witnesses at the evidentiary hearing. Under the circumstances, we find that counsel engaged in an adequate investigation of movant's relatives, and that no favorable information appeared as a result. * * * Counsel was well aware of the helpfulness of favorable testimony by relatives during the penalty stage, as the record discloses, but unfortunately was faced with a situation where reasonable efforts revealed that movant's relatives were strongly opposed to testifying. The decision not to call them as witnesses was thus a matter of trial strategy.

Laws, 708 S.W.2d at 187.

Again, we find the state courts' conclusions compelling. The district court, however, concluded that the record did not "reflect a responsible effort to glean available relatives' own knowledge of and relationship to petitioner." Mem. Op. at 22. We disagree with the district court's conclusion. We think that counsel's efforts in this regard were objectively reasonable.

Trial counsel could have reasonably determined that calling Laws' relatives to the stand, after what they had told him of their feelings for Laws, would have been destructive to Laws' defense. In view of the relatives' adamant refusal to testify favorably on Laws' behalf, cross-examination would not even have been necessary in order to hurt Laws' case. The simplest questions asked on direct examination would have revealed the relatives' total lack of any support for Laws. As a result, the

jury more likely than not would have developed animosity toward Laws and would have distrusted and disrespected counsel's efforts. Counsel's decisions were within the wide range of professionally competent assistance required by Strickland.

3. Failure to Elicit Testimony of Community Members.

Laws argues that his trial counsel was derelict in failing to call to the stand, or consider calling to the stand, a clergyman, statistician or professor to testify against the death penalty. The State first responds that this claim of error is subject to an adequate and independent state procedural bar precluding review by this court, because Laws failed to present this claim on appeal in the state courts. Laws presented the claim in his amended Rule 27.26 motion, but the Missouri trial court held it to be without merit. Laws, however, in appealing from the denial of Rule 27.26 relief, did not brief this allegation of error as a ground for appeal. We nonetheless conclude that this claim is properly before us for the following reasons. Laws filed a pleading with the Missouri Court of Appeals entitled "Appellant's Issues Expected To Be Raised On Appeal," which stated that "The trial court erred in failing to grant appellant's 27.26 motion for failure to investigate and prepare defense witnesses for the penalty stage." Laws argues, and we accept, that trial counsel's failure to elicit testimony from a clergyman, statistician or scholar was included in this general assignment of error. This pleading provided notice to the court of appeals that Laws sought review of this particular point. Furthermore, the court of appeals reviewed the findings of fact and conclusions of law with regard to this point in accordance with Missouri Supreme Court Rule 27.26(j). The court stated in relevant part:

> On appeal, movant raises two points of error. First, movant contends that the trial court failed to make specific findings of fact and conclusions of law regarding his claim of ineffective assistance of

counsel based on defense counsel's decision to refrain from putting on evidence during the penalty stage in mitigation of the death penalty.

* * * *

Movant presented the testimony of several witnesses, including his trial counsel, concerning the advisability of putting relatives and clergymen on the stand during the penalty stage of a capital murder trial to testify in mitigation of the death penalty. This testimony was received without objection by the state. Under the circumstances, we find that the issue was tried by the implied consent of the parties, and thus, will be treated as amending the Rule 27.26 motion to conform to the evidence.

Laws v. State, 708 S.W.2d at 184. (Emphasis added.)

Therefore, Laws did not waive his right to raise the failure of trial counsel to elicit testimony from a clergyman, statistician or professor in support of his ineffective assistance of counsel claim. In addition, the issue has been exhausted at the state level. "The exhaustion doctrine requires only that the state courts have one full and fair opportunity to decide a question which is properly presented to it." Mucie v. Missouri State Department of Corrections, 543 F.2d 633, 636 (8th Cir. 1976), citing Picard v. Connor, 404 U.S. 270 (1971). Since the Missouri Court of Appeals ruled adversely to Laws on this point and the Missouri Supreme Court denied a motion for rehearing and/or transfer, Laws' state remedies as to this point have been exhausted, and it is properly before this court.

At the Rule 27.26 hearing, the following colloquy occurred as to this issue:

Q. Did you ever consider putting on any type of priest or some religious personage to testify?

A. Yes, I considered that. We had used that, two individuals of that ilk in the first trial [for the murder of Woodrow Wilson Elliott] to testify in the death phase.

Q. And what about the second trial? Why was that not--did that not come to pass?

A. After the first trial I spoke with the jurors in the case. And they told me that they had disregarded totally the testimony of these individuals. I believe the gentleman's name is Mr. Gilsonin.

Q. He was a statistician, or professor?

A. And I don't recall the other. I don't recall the other gentleman's name right now.

Q. But the one was a priest and one was a statistician?

A. Right. And the jurors said that they rejected out of hand that testimony and instead centered on the deal between Norman Gilmore and the State in their finding of fifty years rather than death in the first case.

Q. And so that influenced you as far as your trial strategy in the second case?

A. It did. And the fact that the facts in the second case were much different than the facts in the first case.

Q. You mean as far as who the actual killer was?

A. Right.

[Rule 27.26 Tr. at 78-79.]

In considering this testimony, the Rule 27.26 court made the following factual findings:

[Trial counsel] was fully informed at the time of trial of the possibility of calling clergy persons and professors to give their views on the death penalty. [Counsel] decided after due consideration and after calling such persons in the first trial of Leonard Laws that their testimony would not be beneficial to the case.

The court concluded in this regard: "Failure to call witnesses * * * was an appropriate trial strategy."

The district court noted that this issue was not as significant as the others, in part because the district court recognized that counsel had used two "community members" at Laws' prior criminal trial and thus had the opportunity to weigh their credibility and presentation in deciding whether or not to use them again. The district court also noted that the Missouri Supreme Court had recently found such testimony irrelevant. State v. Gilmore, 681 S.W.2d 934, 941 (Mo. banc 1984). The district court concluded, however, that "a discussion with one of twelve jurors as to why the jury reached its decision seems an insufficient basis for a tactical decision in a trial before a different jury--particularly where the consequence of the decision may be fatal." Mem. Op. at 23 n.2.

We note that the record reflects that counsel spoke with more than one of the prior jurors. In any event, we believe that talking to jurors regarding the success of a strategy suggests not deficient representation but keen lawyering. Trial counsel was far better able to evaluate the potential impact of community member testimony after having seen how successful it had been than if he had made the decision to use or reject such testimony in a vacuum.

Counsel's choice was solidly grounded in practical concerns and experience. A trial lawyer does not try each new case with his mind a blank slate; rather, he brings to the case the sum of his knowledge and experience gained through previous trials. This is what distinguishes the veteran litigator from the recent law school graduate. Laws' trial counsel had previously defended Laws for the Elliott murder, see supra notes 1 and 12, and he took the opportunity to find out what had worked and what had not. He was told directly that the jurors had put no credence in the testimony of community members. Relying on this information and his practical experience in the previous case, counsel made the reasonable decision not to present what he considered to be

useless testimony in this case.[13]

Accordingly, we hold that trial counsel's choice not to present the testimony of community members was an intelligent, tactically sound piece of trial strategy. Laws' claim on this ground thus fails the first Strickland prong, which requires that counsel's performance be shown deficient.

V. CONCLUSION.

In examining counsel's performance, we do not use 20-20 hindsight. As this court stated in Blackmon v. White, 825 F.2d 1263 (8th Cir. 1987):

> [T]he courts must resist the temptation to second-guess a lawyer's trial strategy; the lawyer makes choices based on the law as it appears at the time, the facts as disclosed in the proceedings to that point, and his best judgment as to the attitudes and sympathies of judge and jury. The fact that the choice made later proves to have been unsound does not require a finding of ineffectiveness. The petitioner bears the burden of successfully challenging particular acts and omissions of his attorney which were not the result of reasonable professional judgment; it is not enough to complain after the fact that he lost, when in fact the strategy at trial may have been reasonable in the face of an unfavorable case.

Blackmon, 825 F.2d at 1265 (Emphasis added.)

[13]Counsel had pursued substantially the same strategy during the punishment phase of the Elliott trial as he used here. In the Elliott trial, the strategy was successful, because Laws received a life sentence rather than the death penalty. Laws had no complaint with counsel's strategy at the Elliott trial. Counsel then used the essential ingredients of his previously successful strategy in this trial, while refining the strategy to omit the testimony of community members based on the lessons learned from the prior trial. In short, for counsel to repeat a winning strategy in a later trial for the same type of crime, involving the same defendant, strikes us as eminently reasonable.

We believe that counsel's strategy was indeed reasonable in the face of this highly unfavorable case. Accordingly, Laws has failed to show that his trial counsel's performance deprived him of his sixth amendment right to effective assistance of counsel.

For the foregoing reasons, the judgment of the district court is reversed.

McMILLIAN, dissenting.

I respectfully dissent. I would affirm the district court's judgment granting the writ of habeas corpus because appellant did not receive effective assistance of counsel at the penalty phase of his trial. Laws v. Armontrout, No. 86-2214C(3) (E.D. Mo. Dec. 15, 1986) (Memorandum Opinion). Consequently, I would remand the case to the state court for a new trial on the penalty phase only.

This is a death penalty case wherein defense counsel failed to conduct a reasonable investigation into appellant's background and to present mitigating evidence in the bifurcated penalty stage of appellant's trial. An experienced district court judge, after an extended hearing, found that counsel's representation fell far below the standard of reasonableness and prejudiced appellant. Specifically, the court found that counsel (1) failed to investigate and present evidence about appellant's military background and the effect his service in Viet-Nam had on him, (2) failed to make reasonable efforts to contact appellant's family members and to present evidence from them, (3) failed to investigate and present evidence of appellant's prior psychological evaluations, and (4) failed to present any evidence as to the inappropriateness of the death penalty. On the basis of these findings, the district court concluded, and I agree, that there was a reasonable probability that, but for counsel's ineffective representation, the result of the proceedings could have been different.

I agree that the right to counsel is limited to the right of effective assistance of counsel, and by no means does it mean the right to acquittal. Strickland v. Washington, 466 U.S. 668 (1984) (Strickland). In Strickland, the Supreme Court articulated the following standard in determining the issue of ineffective assistance of counsel:

> The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.

Id. at 686. This benchmark has two components, the breach of duty by trial counsel and prejudice resulting therefrom. To establish the breach, counsel's errors must be so serious and of such a magnitude as to be in violation of the sixth amendment guarantee to counsel. In this area we do not deal in absolutes, the test is one of reasonableness i.e., "the skill and diligence that a reasonably competent attorney would exercise under similar circumstances. . . ." Kellogg v. Scurr, 741 F.2d 1099, 1100 (8th Cir. 1984); citing Thomas v. Lockhart, 738 F.2d 304, 307 (8th Cir. 1984). Not only are we counseled to be deferential to trial counsel's decisions, but we must also afford those decisions a strong presumption of correctness. Strickland, 466 U.S. at 687.

Where the defendant's life may be the penalty exacted by the state, I do not believe we ask too much of trial counsel that he or she make a reasonable investigation so that he or she can make and put before the court the best defense available to the defendant. The Strickland court specifically recognized the duty of a defense attorney to investigate:

> [C]ounsel has a duty to make reasonable investigation or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be

directly assessed for reasonableness in all the circumstances. . . .

466 U.S. at 691 (emphasis added). The Supreme Court, in taking counsel to task for inadequate preparation, said:

> [A] complete lack of pretrial preparation puts at risk both defendant's right to an "ample opportunity to meet the case of the prosecution" . . . and the reliability of the adversarial testing process.

Kimmelman v. Morrison, 106 S. Ct. 2574, 2589 (1986) (citations omitted).

Applying the standards and holding of Strickland and Kimmelman to the present case, it is obvious that appellant received ineffective assistance of counsel and was prejudiced thereby. The duty to advocate the defendant's cause, including consulting with defendant and bringing to bear such knowledge as will render the trial a reasonable adversarial process, Strickland, 466 U.S. at 668, mandates that trial counsel investigate and develop facts about the defendant's background in an attempt to develop evidence to mitigate. Once counsel has completed such an investigation, then, and only then, would he or she be in a position to make a reasonable strategic decision whether or not to present the evidence.

In the present case, trial counsel had a telephone conversation with someone claiming to be appellant's stepmother; this person indicated that none of appellant's relatives wished to testify for appellant. Consequently, counsel failed to contact or meet with other relatives to discuss appellant's background and thus failed to gather information concerning appellant's Viet-Nam war experience and his post Viet-Nam personality change.

The majority relies primarily on the presumption of correctness to be accorded a state court's finding of fact as the basis for its decision. While I do not dispute this proposition as a general legal proposition, the presumption of correctness does not apply to the state court's determination of the effectiveness of counsel. In Sumner v. Mata, 455 U.S. 591, 597 (1982), the Supreme Court held that the presumption of correctness accorded the factual findings of the state court under 28 U.S.C. § 2254(d) applies only to historical facts underlying counsel's performance but not to the ultimate conclusion whether effective assistance has been rendered. This latter conclusion is not a finding of fact binding on a federal court because effective assistance is a mixed question of law and fact. Thomas v. Lockhart, 758 F.2d at 307.

Thus, the district court had the duty to carefully examine the conclusion of the state court and to make "every effort . . . to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct and to evaluate the conduct from counsel's perspective at the time." Thomas v. Lockhart, 738 F.2d at 309; see Kellogg v. Scurr, 741 F.2d at 1101. Counsel may not immunize his or her performance from sixth amendment scrutiny by labeling acts or omissions as trial strategy. Kellogg v. Scurr, 741 F.2d at 1102.

I do not take issue with the state court's determination of historical facts. I accept for purposes of this analysis that trial counsel did the acts he testified to: he reviewed the 1981 psychiatric examination but did not consider the 1974 psychiatric examination and did not speak to the psychiatrist to determine the significance of appellant's diagnosis, he spoke to a woman he believed to be appellant's stepmother and may have spoken to appellant's brother but couldn't remember their names, and he talked to one (or perhaps two) jurors to determine whether the testimony of community persons in behalf of appellant was effective.

It is these facts admitted by counsel (and accepted by the state court) that the district court subjected to an independent evaluation to determine if there was effective assistance of counsel. It is this independent evaluation which the majority wrongly rejected. The majority incorrectly applies the presumption of correctness not only to the historical facts found by the state court, but also to the state court's conclusion that effective assistance was provided. See Sumner v. Mata, 455 U.S. at 597. Kellogg v. Scurr, 741 F.2d at 1102.

Granted, trial counsel put much store in his belief that the jury would never impose the death penalty because appellant was not the person who fired the gun and, therefore, did not deserve to die. Such a belief was totally unwarranted, considering the gruesome and calculated nature of the murders with which appellant was charged and his prior capital murder convictions. To disregard the reality and seriousness of the situation was unreasonable and contrary to professional norms. It also evidenced a complete lack of pretrial preparation and put at risk appellant's right to offer evidence of mitigating circumstances and undermines the reliability of the adversarial process. See Kimmelman, 106 S. Ct. at 2589.

The district court, in the present case, did not set the conviction aside; the court only ordered that the case be remanded for a new hearing on the penalty. Thus, appellant will not go free because trial counsel blundered. The only effect thus would be to grant appellant a new penalty hearing, which will be in accord with our notion of fair treatment before one's life can be forfeited. I would affirm the district court.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

-44-

FILED

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EYVON [illegible]
U. S. DISTRICT COURT
E. [illegible]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

LEONARD MARVIN LAWS,)
Petitioner,)
v.) No. 86-2214C(3)
BILL ARMONTROUT,)
Respondent.)

ORDER

A memorandum dated this day is hereby incorporated into and made a part of this order.

IT IS HEREBY ORDERED that petitioner's petition be and the same is granted only so that the sentences imposed by the state court are vacated and the state will be allowed to proceed again to obtain the death penalty upon the state's notifying the state trial court within thirty days of its decision to do so. If the state fails to so notify the trial court of its intent to seek the death penalty anew, the sentence of life imprisonment without parole for fifty years should be imposed on each count, with each term of imprisonment to run consecutively.

Dated this 15th day of December, 1986.

William L. Hungate
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

LEONARD MARVIN LAWS, Petitioner,	)	
v.	)	No. 86-2214C(3)
BILL ARMONTROUT, Respondent.	)	

MEMORANDUM

This matter is before the Court on the petition for writ of habeas corpus filed by Leonard Marvin Laws, pursuant to 28 U.S.C. § 2254.

During October 1980, petitioner was one of three men who allegedly robbed, shot, and burned the home of an elderly couple. Petitioner was charged, in relevant part, with two counts of capital murder. One of the participants, Norman Gilmore, received a fifteen-year sentence and testified against petitioner and the other participant. Petitioner's appointed trial counsel, Timothy Devereux, pursued pretrial motions and hearings thereon; made opening and closing statements, objections and motions during trial; and presented no evidence on behalf of petitioner during the guilt phase of the trial. The trial evidence shows petitioner was not in the home at the time of the shootings, but had been sent outside to see if the shots could be heard.

As to each count of capital murder, the jury was instructed in relevant part:

> A person is responsible for his own conduct and he is also responsible for the conduct of other persons in committing an offense if he acts with them with the common purpose of committing that offense, or if, for the purpose of committing that offense, he aids or encourages the other person in committing it or planning it.
>
> As to Count I, if you find and believe from the evidence beyond a reasonable doubt that:
>
> First, that on or about October 29, 1980, in the County of St. Louis, State of Missouri, George Gilmore caused the death of Lottie Williams by shooting her, and
>
> Second, that the defendant and George Gilmore intended to take the life of Lottie Williams, and
>
> Third, that the defendant knew that George Gilmore was practically certain to cause the death of Lottie Williams, and
>
> Fourth, that the defendant and George Gilmore considered taking the life of Lottie Williams and reflected upon this matter cooly and fully before Lottie Williams was killed,
>
> then you are instructed that the offense of capital murder has occurred, and if you further find and believe from the evidence beyond a reasonable doubt:
>
> Fifth, that the defendant, either before or during the commission of the offense of capital murder, with the purpose of promoting its commission, aided or attempted to aid or agreed to aid George Gilmore in committing the offense of capital murder,
>
> then you will find the defendant guilty under Count I of capital murder.

On the evening of July 23, 1982, a jury found petitioner

guilty of two counts of capital murder for the deaths of the couple.

The punishment phase of the case began the next morning in front of the same jury. For aggravating circumstances, the state (a) introduced evidence, through certified copies of judgments, that petitioner had previously been convicted of two counts of capital murder, two counts of armed robbery, and one count of aggravated assault; and (b) argued the existence of circumstances warranting imposition of the death penalty. During this phase, petitioner's attorney presented argument on behalf of defendant but introduced no evidence of mitigating circumstances. With respect to the mitigating circumstances, the Court gave the jury the following instruction:

> If you decide that a sufficient aggravating circumstance or circumstances exist to warrant the imposition of death, as submitted in Instruction No. 28, it will then become your duty to determine whether a sufficient mitigating circumstance or circumstances exist which outweigh such aggravating circumstance or circumstances so found to exist. In deciding that question you may consider all of the evidence relating to the murders of Clarence and Lottie Williams.
>
> You may also consider
>
> 1. Whether the defendant was an accomplice in the murder of Clarence or Lottie Williams and whether his participation was relatively minor.
>
> 2. Whether the defendant acted under extreme duress or substantial domination of another person.
>
> You may also consider any circumstances which you find from the evidence in extenuation or mitigation of punishment.
>
> If you unanimously decide that a sufficient mitigating circumstance or circumstances exist which outweigh the aggravating circumstance or circumstances found by you to exist, then you must return a verdict fixing defendant's punishment at imprisonment for life by the Division of Corrections without eligibility for probation or parole until he has served a minimum of fifty years of his sentence.

On each count, the jury returned a verdict fixing petitioner's punishment at death and designating the

> following aggravating circumstance or circumstances . . .:
>
> 1. The defendant has a substantial history of serious assaultive convictions.
>
> 2. The murder of such victim was commited [sic] while the defendant was engaged in the commission of capital murder of the other victim.
>
> 3. The defendant murdered Lottie and Clarence Williams for the purpose of receiving money or any other thing of monetary value.
>
> 4. The murders of Lottie and Clarence Williams involved depravity of mind and that [sic] as a result thereof it was outrageously or wantonly vile and horrible.[1]

---

[1]On appeal, the Missouri Supreme Court did not decide whether this last circumstance may have been inappropriate as not sufficiently defined or supported by the evidence. See State v. Laws, 661 S.W.2d 526, 532-33 (Mo. 1983)(en banc), cert. denied, 467 U.S. 1210 (1984). The Missouri Supreme Court specifically found the other three aggravating circumstances sufficiently supported by the evidence.

In his lengthy motion for new trial, petitioner raised numerous issues, including the propriety of imposing or seeking the death penalty for a defendant who did not actually commit the murders, citing "Enlund [sic] v. Florida [sic]."

On September 17, 1982, the judge overruled the new trial motion and sentenced petitioner to death on each count of capital murder, to run consecutively.

Other counsel represented petitioner on appeal from this conviction. With respect to the penalty, petitioner raised on appeal contentions that:

> [1] It was error for the court to allow the prosecution to introduce evidence in aggravation because there had been no statutory notice to the defense that such evidence would be offered.
>
> * * *
>
> [2] It was error for the court to overrule the motion to quash indictment and to impose a sentence of death because the punishment of death is an unconstitutional infliction of cruel and unusual punishment in violation of the due process clause of amendment fourteen of the United States Constitution and Section 21, Article 1, of the Constitution of Missouri.
>
> [3] It was error for the court to impose the death penalty on Laws because such punishment abridges the Missouri and federal constitutional guarantees of due process of law and protections against cruel and unusual punishments in that a sentence of 15 years' imprisonment was imposed on a more culpable participant in the killings. Enmund v. Florida, ____ U.S. ____, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1983).
>
> [4] In this case the sentence of death should be set aside as (a) arising from passion, prejudice and arbitrary factors in that it results from Norman Gilmore's rush to protect himself and prosecutional discretion coupled with vicious and improper final arguments which went unchallenged and uncorrected, and (b) disproportionate to the penalty imposed in similar cases, considering the crime and the defendant, in that Norman Gilmore who has received a 15 year sentence was a more culpable participant and Laws was only a follower in the planning, carrying out and admission of the offense. Section 565.014, R.S.Mo.[;] State v. McIlvoy, 629 S.W.2d 333 (Mo. banc 1982). Enmund v. Florida, ___ U.S. ___, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982).

The Missouri Supreme Court rejected petitioner's arguments and affirmed the conviction and sentence on each count. State v. Laws, supra. In particular, the Missouri Supreme Court held the death sentence was not invalid:

> The defense next argues that the death sentence in this case is constitutionally invalid because of the 15-year sentence imposed on Norman Gilmore following his undertaking to testify for the state. Counsel argues that Norman's culpability was substantially greater than defendant's, and comparable to that of George. It is common prosecutorial practice to enter into a bargain with a criminal in exchange for testimony against other accused persons. There is no requirement that the bargain be offered only to a person who appears to be less blameworthy than the persons against whom he proposes to testify. Norman was the only one of the three robbers who came forward with an offer of testimony in exchange for lenient treatment. He was the only eyewitness who testified. Had he remained silent, there might have been no conviction at all for a shocking crime, or the juries might have compromised their findings on account of uncertainties. There is no basis for

> criticizing the discretion the prosecutor exercised in this case, or for holding that, by bargaining with Norman, the state lost the right to try the defendant and George for capital murder.

Id. at 532 (footnote omitted). In its independent review of the sentence, the state supreme court found (a) defendant "had a full trial, free from prejudicial error;" (b) none of the prosecutor's unobjected to arguments were inflammatory; and (c) at least three of the aggravating circumstances were supported by the evidence. Id. at 532-33. Specifically, with respect to mitigation, the court said:

> If we are to have capital punishment, there is nothing concerning this offender or his crime which presents any reason for mitigation. The defendant and his companions willfully took the lives of an elderly couple, so as to avoid detection and be better enabled to enjoy the fruits of the robbery after fencing the stolen property. Nothing indicates that the defendant was under any psychological constraints or that he was particularly subject to the control of others. Cf. State v. McIlroy, 629 S.W.2d 333 (Mo. banc 1982). The jury's conclusion that the killings were contemplated from the inception of the plan is overwhelmingly supported by the evidence. The defendant was a willing participant from the beginning and played his assigned role by cutting the telephone line, tying the victims, threatening them, serving as lookout during the shootings, and torching the dwelling. Testimony about his expression shows no indication of regret, compassion or remorse, at least while he was free. It is of no significance that he did not fire the fatal shots.

Id. at 533 (footnotes omitted). The Missouri Supreme Court denied petitioner's request for rehearing on December 20, 1983.

Thereafter, petitioner filed a pro se motion pursuant to Mo. S.Ct.R. 27.26 (hereinafter 27.26 motion). Petitioner raised three issues:

> (a) Movant was denied effective assistance of counsel when Movant's trial counsel failed to request a change of venue when the evidence presented to counsel clearly demanded that a change of venue be taken.
>
> (b) Movant was denied effective assistance of counsel when counsel failed to secure a mental examination of Movant when there was evidence that Movant was not legally sane.
>
> (c) Movant was denied effective assistance of counsel when counsel failed to interview witnesses that would have produced favorable testimony, i.e. George Gilmore, Mr. Gilmore would have testified that Movant had nothing to do with the crime at bar.

The court appointed a different attorney to represent petitioner on his 27.26 motion. In an amended 27.26 motion, the following relevant issues were raised:

> (g) Trial counsel failed to present the issue of unequal application of the death penalty to the trial court. When re-instating the death-penalty the United States Supreme Court specified that death penalty schema be applied in a rational form. Trial counsel failed to inform the court of the possible uneven application of Section 565.008 R.S.Mo. (1978) to movant, as the evidence at trial indicated movant acted as look-out not as the triggerman. Recent United States Supreme Court precedent, Enmund v. Florida, _____ decries the application of the death-penalty to non-shooters as constituting unequal application of the death-penalty, and the depriving of the defendant of his constitutional due process rights;

• • •

(i) Trial counsel erred by failing to request a psychological analysis of the movant prior to trial. Movant advised his trial counsel of both his history of assaultive violence and other character traits which clearly indicated the possibility of severe mental illness. By failing to investigate the possibility of a mental incapacity counsel deprived defendant of a potent defense to the charged crime. Failure to investigate said defense violated the movant's Sixth Amendment right to effective counsel. AMEND VI, U.S. CONST., ART. I, SECT. 18(a) MO. CONST.;

(j) Trial counsel failed to object to the prosecutor's introduction of evidence in aggravation despite the fact that movant had not received proper notice in accordance with Section 565.006(2) R.S.Mo. (1978). Trial counsel's failure to object denied the movant his due process rights;

(k) Trial counsel denied movant his right to effective counsel by failing to investigate possible witnesses for the penalty phase of movant's trial. Missouri law allows movant to present evidence in mitigation at the penalty phase of trial. Such evidence in mitigation may comprise testimony by anti-death penalty groups, friends and family of the movant, teachers, religious leaders, or any number of diverse matters. Trial counsel called no one to testify at the penalty phase although movant advised him of several people he knew of whom would be willing to testify. Also counsel should have been aware of community figures who would be willing to testify against the death penalty. People such as: Father Francis X. Cleary, Jesuit Hall, St. Louis University, St. Louis, Missouri, Professor James Gilsinan, St. Louis University, St. Louis, Missouri, Professor Steve Puro, St. Louis University, St. Louis, Missouri, Sister

Mary Pius Fagan, 1200 N. 6th St., St. Louis, Missouri, and Rev. Norman Dake, St. Louis County Jail, St. Louis, Missouri, and Dr. Milton Stohs, St. Louis County Jail, St. Louis, Missouri.

Trial counsel's failure to investigate these witnesses and call them at trial denied movant of his Sixth Amendment right to effective counsel, paralleled by Article I, Section 18(a), Missouri Constitution.

The memorandum supporting the motion addresses specifically the contentions that petitioner's trial counsel was ineffective in (a) failing to request a psychiatric examination, for purposes of the guilt and punishment phases of trial; and (b) failing to introduce evidence in mitigation (specifically by failing "to present the jury with [petitioner's] history of psychiatric problems;" failing "to attempt to contact [petitioner's] immediate family personally, to ask if they would testify on [petitioner's] behalf;" and by "not contact[ing] anyone to testify as to the inherent value of human life, or the possibility of rehabilitation.")

On November 16, 1984, a judge, other than the judge who had presided over petitioner's criminal trial, held an evidentiary hearing on the amended 27.26 motion. During this hearing, petitioner testified he had told Mr. Devereux (a) about psychiatric treatment petitioner received while he was at a Mississippi state correctional facility; (b) who to contact for that information; (c) about friends and relatives who would testify as to petitioner's character; and (d) that he wanted his father and two brothers contacted. Petitioner testified that he

did not know whether his identified relatives were contacted by Mr. Devereux; that he personally wrote several relatives; and that no one from his family attended the penalty stage or the guilt phase of the trial. Petitioner acknowledged that, in terms of his statement to and the evidence discovered by the police, this capital murder case was similar to another capital murder case against petitioner. In the other capital murder case, which went to trial before this one, Mr. Devereux was appointed to and did represent petitioner. Petitioner remembered talking with Mr. Devereux an approximate total of six hours.

Mr. Devereux testified that he is a private practitioner with 95% of his practice being criminal defense work. He saw petitioner more during preparation for the first trial than during preparation for the second trial; and estimated he spent a total of 400 hours in trial preparation. While the facts were different, Mr. Devereux characterized issues regarding the evidence and statements as the same for both cases. Trying the first case (hereinafter referred to as the Elliott case) aided him in the trial of the second case.

Mr. Devereux testified that a report of a psychiatric examination of petitioner that was done by a doctor at Fulton State Hospital in Missouri, in another, earlier capital murder case against petitioner, was provided to Mr. Devereux as part of discovery materials. The report states petitioner had no "neurosis, psychosis or dissociative phenomenon;" and contains the following as the diagnosis:

AXIS I	V71.09	No diagnosis (no mental disorder)
AXIS I	305.91	Mixed substance abuse, continuous
AXIS I	303.91	Alcohol dependence, alcoholism
AXIS II	301.70	Antisocial personality disorder
AXIS III		No diagnosis

The report further states that petitioner was "given the diagnosis of (1) Antisocial Personality and (2) Situational Reaction of Adult Life" upon examination at the Mississippi State Hospital in Whitfield, Mississippi. Mr. Devereux reviewed that report and discussed it with the attorney appointed to represent petitioner at the time the report was prepared. Mr. Devereux did not speak to the doctor who prepared the report. The record of the amended 27.26 motion hearing does not address (a) whether or not this report was considered for use during the punishment phase of the trial; or (b) whether or not Mr. Devereux sought information from the Mississippi State Hospital in Whitfield, Mississippi, to which a reference is made in the Fulton State Hospital report.

With respect to contacting relatives, Mr. Devereux stated he called the phone numbers petitioner provided him. After several unsuccessful attempts, he reached a woman who he thought was petitioner's stepmother. She refused to testify on petitioner's behalf during the penalty phase and said she "knew that the other family members didn't wish to help." Mr. Devereux believed he had spoken to one of petitioner's brothers and the brother also did not want to testify. Mr. Devereux stated "[i]n any death case, you wish to have someone, a relative to testify, to show that he has people who care enough to come in and testify."

Mr. Devereux testified he considered putting on a statistician or professor during the penalty phase of the case but decided against it. He stated he had presented two such witnesses during the punishment phase of the Elliott case, a case in which there was evidence petitioner had actually committed the murder, and the jury returned a verdict for fifty years imprisonment without parole rather than imposition of the death penalty. After the Elliott verdict, Mr. Devereux spoke with a juror who said the jurors "had totally disregarded that testimony" and had focused on the deal struck between the state and Norman Gilmore.

During his testimony, Mr. Devereux noted his belief that petitioner would not receive the death penalty in this case because petitioner was not "the shooter."

None of petitioner's family members testified during the 27.26 motion hearing, nor was evidence of their knowledge of the issues introduced in any manner at that time.

Thereafter, the state court entered findings of fact and conclusions of law on the amended 27.26 motion. In particular, the court found:

> 2. Movant never gave any indication to his trial attorney or the trial court that he was mentally incompetent at the time of the trial herein or at the time of the offenses. In fact Movant had been examined on September 22, 1981, prior to the trial with respect to a third muder [sic] case against Movant in Washington County. The results of that examination show that Movant had no neurosis or psychosis.

* * *

> 4. Timothy Devereux filed numerous state and federal constitutional objections to the statutes charged in Movant's trial, as well as objections to jury selection and trial and sentencing procedures.
>
> 5. Timothy Devereux properly objected to photographs of the victims and their home at the time of trial.
>
> 6. Timothy Devereux participated in hearings upon Movant's motions to suppress statements and evidence, including weapons, in this case.
>
> 7. The State properly provided notice of evidence it would use in aggravation.
>
> 8. Timothy Devereux spent approximately 400 hours in preparation for the trial involving the murders of Clarence and Lottie Williams and the companion murder of Woodrow Wilson Elliott. The motions and witnesses in each of these cases were duplicitious [sic] in most respects.
>
> Based on the above findings of fact the Court makes the following conclusions of law:
>
> 1. There was no indication or evidence which required a new mental examination of Movant. Mental examination conducted pursuant to Chapter 552, further shows that Movant had no significant mental problems.
>
> 2. Failure to call witnesses and to request a change of venue was an appropriate trial strategy.
>
> 3. All of Movant's constitutional rights were fully protected with respect to suppression of evidence and statements by properly filed and heard motions and by proper preservation of these issues at trial and on appeal.

4. All of Movant's state and federal constitutional rights with respect to the underlying charges, trial procedures, jury selection, and sentencing were protected by properly filed pre-trial motions which were heard and ruled upon by the trial judge.

5. Unequal application of the death penalty is an issue which was properly raised on appeal in the underlying case. It was not appropriate for the trial judge to rule upon this issue. However, the evidence in this case indicated that Leonard Laws fully intended to kill Clarence and Lottie Williams. Because of his intent and the fact that George Gilmore received the death penalties, Leonard Laws's sentences herein do not run afoul of Missouri's requirement of equal application or of the United States Supreme Court's requirements in Enmund v. Florida.

* * *

7. Timothy Devereux protected Leonard Laws's right to a fair trial through pre-trial motions, adequate trial preparation, a skillful trial, and a preservation of any points for appeal. Movant recognized the quality of his representation by Timothy Devereux as evidenced in [a post-trial letter to Mr. Devereux from petitioner].

On appeal from this ruling, petitioner asserted:

> [1] The trial court erred in omitting from its findings of fact and conclusions of law any mention of the issue concerning original trial counsel's failure to produce any evidence in mitigation at the death penalty stage of movant's trial whereby such failure allowed the jury to incorrectly assess the death penalty against movant in violation of his constitutional right of due process as guaranteed by the fourteenth amendment, applied to the various states by the eighth amendment of the United States Constitution and paralleled in section 18(a) of the Missouri Constitution.

* * *

> [2] The trial court clearly erred in concluding that appellant's counsel provided effective assistance of counsel when counsel:
>
> (a) failed to properly investigate movant's psychiatric state, by failing to ascertain the meaning of certain terms contained in movant's psychological evaluation, which could have provided evidence of a mitigated mental state at trial, or evidence in mitigation at the penalty phase, and
>
> (b) failed to contact directly any member of movant's family, who movant gave counsel the names of, in order to provide evidence in mitigation.
>
> Whereby the court denied movant his right to effective counsel as guaranteed by the sixth amendment to the United States Constitution and paralleled in section 18(a) of the Missouri Constitution.

The Missouri Court of Appeals found the record sufficient for purposes of reviewing "whether attorney Devereux rendered ineffective assistance of counsel by refraining from presenting mitigational evidence during the penalty stage of [Laws'] trial." Laws v. State, 708 S.W.2d 182, 185 (Mo. App. 1986). With respect to the psychiatric examination issue, the state appellate court found

> attorney Devereux made a reasoned strategic decision based on all the circumstances to refrain from putting on evidence at trial of movant's psychiatric state. . . . [A]ttorney Devereux made a careful and conscious choice against putting on psychiatric evidence during trial or at the penalty stage. . . . Counsel could have well reasoned that the jury would be more

> harsh with movant as a result of learning that his behavior could be erratic and violent.

Id. at 185, 186. That court further determined:

> Under the circumstances, we find that counsel engaged in an adequate investigation of movant's relatives, and that no favorable information appeared as a result. If an attorney believes that the testimony of a witness would not unequivocably support his client's position, it is a matter of trial strategy not to call him to the stand. State v. Turner, 623 S.W.2d 4, 12 (Mo. banc 1981); Phillips v. State, 639 S.W.2d 270, 273 (Mo. App. 1982). Counsel was well aware of the helpfulness of favorable testimony by relatives during the penalty stage, as the record discloses, but unfortunately was faced with a situation where reasonable efforts revealed that movant's relatives were strongly opposed to testifying. The decision not to call them as witnesses was thus a matter of trial strategy. The manner in which trial strategy is implemented does not provide an adequate basis for an attack on trial counsel. Radford v. State, 663 S.W.2d 309 (Mo. App. 1983).

Id. at 187. The court also found no prejudice as a result of the attorney's conduct and concluded there was no ineffective assistance of counsel. Petitioner's post-opinion motions for rehearing and for transfer were denied on March 25, 1986, and May 13, 1986.

Petitioner then filed in this Court a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. In his original pro se petition, petitioner reiterated ten issues or points that had been raised at various stages of the state court proceedings. The Court appointed counsel to represent petitioner herein and

granted leave to file an amended petition. By his amended petition, Laws raises two issues:

(1) whether petitioner was denied ineffective assistance of counsel in violation of his sixth and fourteenth amendment rights when his court-appointed attorney failed totally to put on any evidence in mitigation during the punishment phase of petitioner's capital murder trial; and

(2) whether the imposition of the death penalty violates petitioner's eighth and fourteenth amendment rights in that the sentence is "imposed for a conviction based on accomplice liability only, and where petitioner had no direct role in the killing of the victims."

No issue is raised herein with respect to trial counsel's conduct during the guilt phase of petitioner's state criminal trial. Petitioner's memorandum seeks only a new trial of the death penalty phase pursuant to Mo. Rev. Stat. § 565.006(3)(1978). In support of his petition, Laws filed (a) an affidavit stating that he and Mr. Devereux briefly discussed petitioner's service in the Army; (b) his Army "Enlisted Qualification Record;" (c) statements from family members that they would have helped petitioner if they had been contacted or asked, and stating they noticed a change in petitioner after his military duty; and (d) a summary of petitioner's records from Mississippi State Hospital, Whitfield, Mississippi. Respondent opposes petitioner's request for relief.

On December 10, 1986, the Court heard argument on this matter. Appointed counsel for petitioner and counsel for the respondent each presented able briefs and made outstanding oral arguments in support of their positions. There seems to be agreement that important guidelines for determining the ineffective assistance of counsel claim here are to be found in Strickland v. Washington, 466 U.S. 668 (1984).

Respondent notes that Bill Armontrout, Warden of the Missouri State Penitentiary, is the proper party respondent, and that petitioner's claims are exhausted except as specifically noted.

The Court finds the exhaustion rule does not here bar consideration of the claims raised by petitioner, cf. Strickland, supra, 466 U.S. at 679, 684 (noting appellate court's finding the exhaustion requirement "is a matter of comity rather than of jurisdiction," and finding the exhaustion rule is not jurisdictional); and, in any event, the state courts had before them each of petitioner's present claims, except perhaps the specific argument regarding petitioner's Vietnam experience. The Court finds that claim properly before this Court since it may be part and parcel of petitioner's claim the ineffective assistance of counsel occurred upon the attorney's failure to produce evidence of petitioner's mental health or to produce testimony of relatives during the punishment phase of the trial. Either type of evidence could have elicited information regarding petitioner's military service or his pre-service and post-service

well-being. Both the alleged failure to produce mental health evidence or to elicit relatives' testimony were "exhausted" in the state courts.

In construing the constitutional requirement for effective assistance of counsel at the penalty stage in a capital murder case, the United States Supreme Court stated the "benchmark . . . must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, supra, 466 U.S. at 686.

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. at 687.

In analyzing counsel's performance, the Court

> must be highly deferential . . . . [E]very effort [must] be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.

Id. at 689. Looking to the facts of the case, the Court must "determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." Id. at 690. Counsel's

performance is considered in light of the several duties owed by an attorney representing a defendant in a criminal case: a duty of loyalty, a duty to advocate the defendant's cause, a duty to consult on important decisions and to keep defendant informed of important developments in the course of the prosecution, and a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. Id. at 688. With respect to the duty to investigate, the Court said:

> counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Id. at 691.

If counsel's conduct falls beyond the bounds of professional norms, then the defendant must also show

> there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. . . .
>
> When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer -- including an appellate court, to the extent it independently reweighs the evidence -- would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.

Id. at 694, 695.

Giving due deference to the conduct of counsel under the circumstances at the time of the capital murder trial at issue here, the Court deems the conduct did not meet the standard for effective assistance of counsel under the Sixth Amendment.

The record reflects that trial counsel's decision not to put on any evidence in mitigation was due to (a) his belief a jury would not impose the death penalty since petitioner had not directly participated in the killings; (b) his discussion with a juror from petitioner's earlier capital murder case indicating the jury had decided not to impose the death penalty because of the deal struck between the state and another participant in the crime, a deal and participant also involved in this capital murder case; and (c) his phone conversations with one of petitioner's brothers and a woman he thought was petitioner's stepmother. The decision was not based on a reasonably thorough investigation into petitioner's character and background or into other information potentially relevant to mitigating circumstances. The record does not reflect counsel's investigation of petitioner's military or psychiatric background for purposes of the punishment phase of the trial. Nor does the record reflect a responsible effort to glean available relatives' own knowledge of and relationship to petitioner, see Eldridge v. Atkins, 665 F.2d 228, 235 (8th Cir. 1981), cert. denied, 456 U.S. 910 (1982)("[w]hen a man's liberty is at stake counsel owes a greater duty than to simply accept someone's hearsay statement

that the witness would rather not testify"), before deciding whether or not to present such relatives' testimony.[2]

While the attorney was not called upon to forget what he had learned during petitioner's earlier capital murder trial, the risk of relying to a great extent on one prior juror's observations and on counsel's own perceptions of the appropriate punishment under the facts is too great here. Cf. id. (observing that counsel's preparation and trial strategy was improperly based on his "conclusory decision" that defendant was guilty). Under the circumstances, counsel's decision to offer no evidence at the penalty phase was a bold tactic. Had it succeeded, its brilliance may have been unquestioned. Having failed, it must be considered beyond the bounds of professional norms.

The Court further finds that the outcome of the punishment phase of the case would have been different absent counsel's failure to investigate fully and to present mitigating evidence. As the United States Court of Appeals for the Eighth Circuit recently noted in construing Arkansas law,

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[2]The failure to call community members to testify regarding the inappropriateness of the death penalty is not as significant to the Court. Counsel had used two such members at petitioner's prior criminal trial and thus counsel could weigh their credibility and presentation in determining whether or not to call them. Moreover, the Missouri Supreme Court has recently found such testimony irrelevant. State v. Gilmore, 681 S.W.2d 934, 941 (Mo. 1984)(en banc). The Court notes, however, that a discussion with one of twelve jurors as to why the jury reached its decision seems an insufficient basis for a tactical decision in a trial before a different jury -- particularly where the consequence of the decision may be fatal.

> [t]he whole question of the death penalty depends . . . on the jury's discretion in weighing aggravating circumstances against mitigating circumstances. . . . A finding of a mitigating circumstance should have been an important objective in [this] case[.]

Woodard v. Sargent, No. 83-2168, slip op. at 9 (8th Cir. Nov. 20, 1986). While recognizing the Eighth Circuit was analyzing Arkansas law, this Court believes the principles enunciated in Woodard would be applicable in this case. See Trimble v. State, 693 S.W.2d 267, 278 (Mo. App. 1985)(jury's finding that mitigating circumstances outweigh aggravating circumstances is essential to the Missouri statutes' application of the death penalty). "It is not the bifurcated proceeding that is vital. Rather, it is the information and guidance given to the sentencing authority which enables it to exercise discretion in imposing the death penalty without random, freakish, or discriminatory results," Trimble, supra, 693 S.W.2d at 278 (citation omitted). Where no evidence in support of mitigating circumstances is introduced, the important task of weighing the circumstances is diminished, if not absent. Based on the state's proof of the circumstances of the crimes here, and the state's evidence of petitioner's prior crimes, "the conclusion was foregone on the evidence before the jury." Id. at 278 (finding failure to present evidence in mitigation, other than defendant's age, would have been ineffective assistance of counsel pursuant to Strickland if defendant had not unequivocally instructed counsel not to present any such evidence).

The Court believes it must, under the Constitution and case law, find counsel's actions in the death penalty phase of this case constituted "ineffective assistance of counsel." This was a most difficult finding to make in this case. Petitioner's trial counsel had heretofore enabled petitioner to avoid the death penalty and in this case took steps counsel could well have believed best calculated to obtain a satisfactory result for his client. Trial counsel may well believe he had reasonable grounds for the decision he reached in the death penalty phase of this cause. Nonetheless, that decision was wrong.

Trial judges are well acquainted with situations in which they believe they have reasonable grounds for decisions, but later learn from higher authority that their decision was wrong.

Trial attorneys well know that in times of stress and conflict, the most difficult thing to do is to do nothing. They are also well aware that, at times, that is absolutely the best course to choose to obtain the desired results. To a certain extent, we risk developing a body of law that says at the death penalty phase defense counsel must introduce some evidence or be found ineffective, while it is certainly possible and sometimes probable that putting on and offering evidence may worsen the client's chances. Perhaps this ruling stresses only the importance of fully investigating each case on its merits before deciding that as a matter of reasonable strategy, no evidence should be introduced. Where counsel elect to offer no evidence at the penalty phase, they may be well advised to make a clear

record of the investigation they have made and the reasons for the strategy chosen. It is true that defendants are entitled to a fair trial but not a perfect trial; yet, where the death penalty is involved, perfection should be closely approximated. The finality of the penalty mandates caution in its imposition.

Having determined that, under the circumstances, trial counsel rendered petitioner ineffective assistance during the punishment phase of the capital murder trial at issue here, the Court will deny any relief to the extent it is directed to the capital murder convictions and will grant petitioner relief by vacating the consecutive death penalties previously imposed. The state will be allowed to proceed again to obtain the death penalty upon the state's notifying the state trial court within thirty days of its decision to do so. If the state fails to so notify the trial court of its intent to seek the death penalty anew, the sentence of life imprisonment without parole for fifty years should be imposed on each count, with each term of imprisonment to run consecutively. State v. Mercer, 618 S.W.2d 1, 13 (Mo.)(en banc)(Bardgett, C.J., concurring in part and dissenting in part), cert. denied, 454 U.S. 933 (1981); accord, Woodard, supra, slip op. at 10 (instructing district court to enter judgment reducing Woodard's death penalty sentence to a term of imprisonment "unless the State, within such reasonable time as the District Court may fix, commences proceedings to re-try the question of punishment[.]").

Based on the foregoing, the Court does not now address petitioner's contention that his eighth amendment rights were violated by imposition of the death penalty, citing Enmund, supra.

Dated this 15th day of December, 1986.

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

FILED

BY U.S. DISTRICT COURT
E. DISTRICT OF MO.

LEONARD MARVIN LAWS,
Petitioner,
v.
BILL ARMONTROUT,
Respondent.

No. 86-2214C(3)

ORDER

This matter is before the Court on respondent's motion for reconsideration. Petitioner opposes the motion.

On December 15, 1986, the Court, in relevant part, granted petitioner's petition for habeas corpus, only so that death penalty sentences imposed by the trial court were vacated and the state was provided thirty days in which to notify the trial court if the state wanted to proceed again to seek the death penalty.

The Court determined that, under the circumstances, petitioner's trial attorney provided ineffective assistance of counsel during the punishment phase of the capital murder trial due, in part, to a failure more carefully to investigate petitioner's military service.

Petitioner attached as Exhibit C to his amended petition for habeas corpus, filed November 14, 1986, a copy of

military records for Leonard M. Laws,[1] service number RA 16 992 882.

Respondent now moves to reconsider this Court's decision on the petition for writ of habeas corpus based on a new exhibit. The new exhibit is marked as respondent's Exhibit K and consists of copies of military personnel records for Leonard M. Laws, service number RA 16 992 882.

Petitioner and respondent each seek to delineate petitioner's service record and, except for a one-page Form DA 20, the submissions are totally different. Each purports to be the service record of "Leonard M. Laws, RA 16 992 882." In petitioner's submission, Laws was awarded or authorized to receive the (a) National Defense Service Medal; (b) Vietnam Service Medal; (c) Vietnam Campaign Medal W/60 Device; and (d) Good Conduct Medal.

Respondent's submission for "Leonard M. Laws, RA 16 992 882" contains no indication that the foregoing awards were authorized or received. Respondent's submission does contain documents indicating petitioner was involved with two "Article 15" proceedings while in the United States Armed Services, one infraction being driving a vehicle 45 miles per hour in a 35-mile-per-hour zone; and the other being absent without leave for approximately twenty-four hours.

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[1]While the service number is constant, in petitioner's Exhibit C and respondent's Exhibit K the first name is spelled variously: "Leonard" and "Learnard."

Petitioner's submission indicates petitioner received an honorable discharge and that indication is not controverted.

Based on respondent's Exhibit K alone, the Court does not find sufficient reason of record to support reconsideration of the Court's December 15, 1986, order. Indeed, the discrepancies in petitioner's service record, as submitted by the two parties, tend to illustrate this Court's belief that the investigation conducted here was less than complete.

Accordingly, after careful consideration,

IT IS HEREBY ORDERED that respondent's motion for reconsideration be and the same is denied.

Dated this 24th day of December, 1986.

UNITED STATES DISTRICT JUDGE